

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 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. 2011AP2134-CR

Cir. Ct. No. 2009CF5824

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IRA MICHAEL PORTER,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Ira Michael Porter appeals from an amended judgment of conviction for possession of a firearm by a felon, as a repeater,

contrary to WIS. STAT. §§ 941.29(2) and 939.62(1)(b) (2009-10).¹ Porter pled guilty after the trial court denied his suppression motion.² On appeal, he argues that the trial court should have suppressed the gun that police found in Porter's pocket during a traffic stop because "the police lacked reasonable suspicion to search or pat down Mr. Porter." We reject Porter's argument and affirm the judgment.

BACKGROUND

¶2 At the suppression hearing, police officers Michael Gasser and Zachary Thoms testified that they were on patrol when they received a report of gunshots being fired. The officers were told that a caller had reported that three African-American males in dark clothing were involved. About twenty-five minutes later, the officers saw a white Cadillac without a front license plate parked on the side of the road with its motor running about six blocks from the reported shooting location. There were three African-American males in the vehicle, all wearing dark clothing.

¶3 Thoms testified that because the Cadillac did not have a front license plate and the men in the car fit the description of the men from the shots-fired call, the officers decided to conduct a stop. Thoms approached the front passenger door and opened it, allowing him to speak to Porter, the front-seat passenger.

¹ The judgment of conviction was amended after Porter's postconviction motion for additional sentence credit was granted.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The Honorable Patricia D. McMahon denied Porter's motion to suppress, while the Honorable Rebecca F. Dallet accepted Porter's guilty plea and sentenced him.

Thoms identified himself and asked Porter questions such as his name and why he was in the area. Thom testified that while he spoke to Porter, Porter's hands were in his lap and Porter was "kind of fidgety, looking back and forth and not answering my questions the way I would like him to." Thoms said Porter "made a few motions toward his right pocket as I was talking to him." Thoms testified that he asked Porter to exit the vehicle and that Porter stated the following in "an aggressive tone": "Why should I get out of the vehicle?" Thoms said he then asked Porter if there was a gun in the car and Porter "did not answer, which made me very, very nervous."

¶4 Thoms ordered Porter to get out of the car and Porter did so. Thoms told Porter to raise his hands and Porter complied "for about one second" before allowing his right arm to fall "down towards the pocket once again" as Thoms was attempting to pat down Porter. When Porter allowed his arm to fall, Thoms placed Porter in handcuffs because he "wasn't about to let him try to [lower his arm] again." Thoms patted down Porter and felt "a hard object [that] seemed to be fairly large" in Porter's jacket. Thoms removed the object from Porter's right jacket pocket; it was a pistol.

¶5 The trial court accepted the officers' testimony (which was not contradicted at the hearing) and made findings of fact consistent with that testimony. The trial court found that the stop and patdown were reasonable and denied the suppression motion. With respect to the patdown, it stated:

I think the combination of the gestures that [Porter] made and the responses of [Porter] and the increased aggressiveness [made it] ... reasonable for officer safety for [Thoms] to investigate further and do a patdown.

And then it was clearly reasonable once the patdown was being conducted and the defendant tried to

put his arms down despite the officers' direction that further patting down was appropriate.

STANDARD OF REVIEW

¶6 On review of a trial court's ruling on a motion to suppress, this court will uphold the trial court's factual findings unless they are clearly erroneous, but "[w]hether the facts satisfy constitutional principles is a question of law for this court to decide." *State v. Bridges*, 2009 WI App 66, ¶9, 319 Wis. 2d 217, 767 N.W.2d 593.

DISCUSSION

¶7 On appeal, Porter does not challenge the trial court's factual findings. He also explicitly concedes that the stop was valid based on the car's missing front license plate. Further, citing *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), he acknowledges that the officers were entitled to "order the passengers to get out of the car pending completion of the stop." At issue, Porter argues, is whether his "Fourth Amendment rights were violated when the officer began to pat him down after he got out of the car."

¶8 *Bridges* summarized the law applicable to the issue Porter raises:

During an investigative stop (temporary detention), an officer is authorized to conduct a search of the outer clothing of a person (frisk or pat-down) "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.'" A protective search of a person being questioned during an investigatory stop is reasonable if the stop itself is reasonable and if the officer reasonably believes that the person might be armed and dangerous.

We review an officer's decision to perform a protective search with an objective test:

“[W]hether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger” because the person may be armed with a weapon and dangerous. “[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer’s] inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience.”

A determination of whether an officer had reasonable suspicion to effectuate a protective search for weapons is made “on a case-by-case basis, evaluating the totality of the circumstances.”

See id., 319 Wis. 2d 217, ¶¶10-11 (bracketing supplied by *Bridges*; citations and some indenting omitted).

¶9 Porter contends that it was not reasonable for Thoms to suspect that Porter had a gun and, therefore, the patdown was not justified. He explains:

Under the totality of the circumstances, it was not reasonable to do a pat down of Mr. Porter because the police officer could not reasonably suspect that he had a gun. First, Mr. Porter patted his waist [when he was sitting in the car]. The police officer did not mention being able to see the bulge of the weapon. He was also in a car, so he was sitting down; the gun wouldn’t have been moving anywhere since he wasn’t moving, so it would be odd to assume there was a gun there just from the patting of a pocket.

Second, there was very little information to tie Mr. Porter to the call that came through dispatch so there was not a reasonable reason to suspect Mr. Porter would have a gun. He was a black male wearing black clothing with other black males wearing black clothing, but he was seen in a car (rather than walking), he was located in the opposite direction of where the caller said that the subjects were headed, and he was seen about 30 minutes after the caller first reported the shots fired.

We are not convinced that the trial court erred when it denied Porter’s suppression motion.

¶10 The undisputed facts in this case justified Thoms’s protective search. The officer was aware that Porter fit the general description of men possibly involved in a recent shooting incident nearby. Thoms also observed the following when he spoke with Porter: nervousness, fidgeting, motions toward a pocket, evasiveness, and an aggressive response to being asked to exit the car. Further, Porter refused to answer when Thoms asked whether there was a gun in the car. *See id.*, ¶¶19-20 (An officer may ask questions “to obtain information confirming or dispelling the officer’s suspicions concerning weapons” and the individual’s response, “including the absence of or refusal to provide a response, may provide information that is relevant to whether a protective search is reasonable.”).

¶11 Under the totality of the circumstances, a reasonably prudent officer drawing on his or her experience would have been warranted in believing that Porter “might be armed and dangerous.” *See id.*, ¶¶10-11. The initial patdown was justified, and the more complete patdown that took place once Porter was handcuffed was further justified by Porter’s refusal to cooperate with instructions to keep his hands in the air. We agree with the State’s conclusion that the trial court “reached a logical conclusion that reasonable suspicion had been established based upon the uncontroverted testimony ... and the attendant circumstances.” Therefore, we reject Porter’s challenge to the denial of his motion to suppress and affirm the judgment.

By the Court.—Judgment affirmed.

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

