

**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. 2011AP2344-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF2313

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN LAVELL BURKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ,¹ Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Kevin Burkes appeals a judgment convicting him of possession of a firearm by a felon. He contends the handgun should have been

¹ The only issue raised on appeal relates to the court's denial of Burkes' motion to suppress evidence. Judge Rebecca Dallett presided over the suppression hearing.

suppressed because officers lacked reasonable suspicion to justify an investigatory stop. The circuit court denied the motion, finding there was no stop, that Burkes got into a car of his own volition and was not detained by the officers until Officer John Schott observed the handgun and probable cause was established.² We affirm the order denying the suppression motion and the resulting judgment of conviction.

¶2 Schott was on patrol in a high-crime area of Milwaukee when he observed a group of seven individuals loitering in the middle of the street, preventing another vehicle from driving through. After several individuals dispersed, the vehicle passed and the individuals walked back to the middle of the street. Schott then drove his squad car to the scene where he observed Burkes disengage from the group and walk toward a parked car. Burkes leaned his upper torso into the open driver side window. Schott continued to drive toward the vehicle, stopping five to seven feet from it. At that time, Burkes ran around the front of the car, opened the passenger door, entered the car and slammed the door behind him. Schott exited his squad car and stood at the driver side door of Burkes' car where he observed Burkes lift his jacket, exposing a firearm in his waistband. Schott announced, "Gun, gun, gun." Burkes then reached toward the gun, and Schott drew his firearm. Schott and Officer Christopher Schlachter ordered Burkes to show his hands, but Burkes failed to comply and again reached for the firearm, eventually throwing it into the back seat of the vehicle.

² The court also found the officers had sufficient grounds to detain Burkes to cite him for loitering or impeding traffic. Although review of that alternative basis for denying the suppression motion is not necessary, were we to review that decision we would affirm it as well.

¶3 Burkes contends the officers lacked sufficient specific and articulable facts to justify a stop or seizure of Burkes. A stop must be based on an officer's reasonable suspicion that a crime has been or is being committed by the person stopped. *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. A person is "seized" within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

¶4 Burkes' argument is based on his assertion that he was stopped or seized because a reasonable person would not feel free to leave after Schlachter "chased" him around the front of Burkes' car. At the suppression hearing, the court sought clarification of all of the activities and ultimately found there was no "act of chasing." Rather, Burkes decided on his own where he was going and decided to get into a car. The officers did not direct him to go to the car or confine him there. There was no "stop" by police. Rather, Burkes stopped himself when he voluntarily entered the car. The stop for Fourth Amendment purposes did not occur until the officers told him to put up his hands. By that time, Schott had already seen Burkes' concealed weapon. Because the court's findings are not clearly erroneous, the record provides no factual basis for Burkes' argument that the officers lacked reasonable suspicion to perform an investigatory stop and did not seize Burkes until after probable cause existed to arrest him for carrying a concealed weapon.

By the Court.—Judgment affirmed.

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

