COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 3, 1996

No. 95-2878-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT K. SCHAEFER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

ANDERSON, P.J. Scott K. Schaefer appeals from a judgment of conviction for possession of cocaine, contrary to § 161.41(3m), STATS. We conclude that the trial court did not err in denying Schaefer's motion to suppress the evidence seized from him. Accordingly, we affirm the judgment of the trial court.

According to the criminal complaint, Police Officer Paul John Paikowski was dispatched to investigate the report of a suspicious person operating a brownish-colored Ford with the license plate KUD-747. The operator of the described car had allegedly threatened someone with a gun while in a municipal lot. The operator of the car was said to have indicated that he possessed a gun while motioning to the glove box inside of his car. Paikowski located Schaefer and told him that he would be conducting a "pat-down" search. Schaefer raised his arms out to his sides and told Paikowski that he had permission to search him and the vehicle.

During the pat-down search, Paikowski felt a firm object in Schaefer's right front pocket of his jeans which he believed was consistent with a bindle used to conceal drugs. When Paikowski felt the object he asked Schaefer what was inside his pocket and Schaefer replied that it was an envelope containing pipe screens which he used to smoke marijuana on occasion. Paikowski proceeded to put his hand into Schaefer's pocket and felt two separate pliable-like bindles and asked Schaefer what else was in his pocket. Schaefer said that it was personal. When Paikowski asked what he meant by "personal," Schaefer said that he had a small amount of cocaine for personal use. Paikowski then removed the objects from Schaefer's pocket where he found pipe screens and cocaine.

Schaefer filed a motion to suppress the physical evidence seized from him, claiming that the search and seizure were unlawful and violated his constitutional rights. The trial court denied his motion. Schaefer subsequently

pled no contest to the criminal charges. A judgment of conviction was entered against him for possession of cocaine. Schaefer appeals.

Schaefer argues that the trial court erred by denying his motion to suppress physical evidence seized from him. When we review a trial court's decision regarding a motion to suppress evidence, the court's findings of fact will be sustained unless they are contrary to the great weight and clear preponderance of the evidence. ***State v. Callaway***, 106 Wis.2d 503, 511, 317 N.W.2d 428, 433, *cert. denied*, 459 U.S. 967 (1982). However, we independently examine the circumstances of the case to determine whether the constitutional requirements of reasonableness have been satisfied. ***Id.***

Schaefer contends that the search exceeded the scope of a ***Terry***-type pat down. He states that clearly the purpose of the search in this case was a pat-down frisk for weapons as opposed to a search incident to formal arrest. As such, Schaefer claims that Paikowski's pat-down search in which he could foresee the possibility of coming across items of contraband was a direct violation of the ***Terry*** search.

In ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), the Supreme Court stated that "[a] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." In order to execute a valid investigatory stop, ***Terry*** requires that a police officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d

830, 834 (1990). "Such reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** (quoted source omitted). It is an objective standard: Would the facts available to the officer at the moment of the seizure warrant a person of reasonable caution in the belief that the action taken was appropriate?

Here, Paikowski acted upon a report of a suspicious person who had allegedly threatened someone with a gun. Based upon Schaefer's alleged criminal activity, Paikowski's stop and pat-down search for weapons were reasonably warranted.[1] Additionally, Paikowski conducted a proper pat down which was limited to Schaefer's outer clothing. *See* ***id.*** at 146-47, 456 N.W.2d at 837.

Next, we turn to whether once Paikowski failed to locate any weapons on Schaefer's person, he could search Schaefer's pocket for contraband. Paikowski felt what he thought to be contraband in Schaefer's pants pocket during the pat down for weapons. Paikowski did not immediately reach into the pocket. Instead, he asked Schaefer what was in his pocket and Schaefer answered that he had screens which he used to smoke marijuana on occasion. Schaefer's answer provided Paikowski with probable cause to believe that Schaefer could be possessing contraband. When Paikowski reached into

[1] In ***Terry v. Ohio***, 392 U.S. 1, 27 (1968), the Court concluded: "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."

Schaefer's pocket and felt another bindle, he asked Schaefer what was in the other bindle. Schaefer answered that it was cocaine. Schaefer divulged this information to Paikowski when asked. Based on Schaefer's answers, Paikowski had probable cause[2] to search his pocket and obtain the contraband. *See* ***id.*** at 146, 456 N.W.2d at 837.

As in ***Richardson***, the evidence in this case was in plain view in that it was realized through Paikowski's sense of touch. The evidence was inadvertently discovered during the pat down for weapons. "Though a pat-down provides no justification to search for evidence of a crime, it does not mean that the police must ignore evidence of a crime which is inadvertently discovered." ***Id.*** at 150, 456 N.W.2d at 839 (quoted source omitted). We therefore affirm the trial court.

By the Court.—Judgment affirmed.

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

[2] "Probable cause requires that the police officer have facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant has committed or is in the process of committing an offense." ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).