

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 21, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3220-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN K. PINNEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Wood County:
EDWARD F. ZAPPEN, JR., Judge. *Reversed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Steven Pinney appeals from a judgment of conviction, specifically challenging an order denying his suppression motion. Because we conclude that the circuit court erred in denying Pinney's suppression motion, we reverse the judgment of conviction.

BACKGROUND

Pinney lived in a house with Jackie Johnson. On September 18, 1994, Johnson's sister Jane Sailer was visiting the house. Sailer called police near 9:00 p.m., complaining that Pinney was creating a drunken disturbance with friends. Police responded to the call and determined that: (1) Pinney was not on the property, and (2) Sailer and Johnson were under the influence of alcohol. The police left without taking any further action.

Approximately one hour later, Sailer again contacted police, this time alleging that Pinney had come back carrying a .22 rifle.¹ Police again responded to the house and en route saw a man they believed to be Pinney walking away from the house. The suspect was not armed with a long gun.

The State agrees that the police officers' action at this point amounted to an arrest. Specifically, Pinney was ordered to lie spread eagle on the ground, was not free to leave, had drawn weapons pointed at him, and was handcuffed. Searching Pinney, police found THC, a marijuana derivative.

Pinney moved to suppress the THC as the result of an improper search. The circuit court denied his motion. We reverse.

ANALYSIS

Probable cause to arrest exists when the totality of the circumstances lead a reasonable police officer to believe the defendant has probably committed a crime. *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161, *cert. denied*, 510 U.S. 880 (1993). That quantum of evidence was not met here.

¹ There is some confusion in the record as to whether police were informed that Pinney was armed with a .22 rifle or with a shotgun. However, the record is clear that the police officers responding to Sailer's second call were informed that Pinney was armed with a long gun, as opposed to a handgun.

Police were first requested to remove Pinney from his own home based on the word of a visitor known to police to be under the influence of alcohol. Police investigation of this claim proved it groundless, and the police left after explaining that it would take some evidence to apprehend Pinney.

Police were then again requested to apprehend Pinney by the same complainant they had previously found not credible.² This time, the complainant added a detail easily susceptible of visual confirmation, namely, that Pinney was armed with a long gun.

When police saw a suspect they thought might be Pinney, they arrested him although: (1) they were not sure he was, in fact, Pinney, and (2) the suspect was not in any manner disorderly, nor was he armed with a long gun. Arrest under these circumstances was unreasonable.³ It therefore follows that a search incident to arrest was improper, as was the order denying suppression.

By the Court. – Judgment reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Although hearsay evidence may be grounds for an arrest, the hearsay evidence must be derived from a credible source. *Laster v. State*, 60 Wis.2d 525, 532, 211 N.W.2d 13, 16 (1973).

³ As previously stated, the State concedes that this was an arrest, not an investigatory stop.