COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-0785-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DERRICK WILDER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

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

FINE, J. Derrick Wilder appeals from judgments convicting him on guilty pleas of possession of a firearm by a felon, *see* § 941.29(2), STATS., and of carrying a concealed weapon, *see* § 941.23, STATS. He argues that the police

unlawfully stopped him and searched him for weapons. The trial court denied his motion to suppress.[1] We affirm.

I.

The trial court held a hearing on Wilder's motion to suppress. Two persons testified, one of the officers stopping Wilder, and Wilder.

According to the officer, at approximately 7:00 p.m. on a May evening, he and his partner were in plainclothes in an unmarked squad car when they saw Wilder walking toward them. The officer was the passenger.

The officer testified that he first saw Wilder when Wilder was approximately fifteen feet away, and that the officer noticed that Wilder was "having some problems that he was putting a dark object -- he was attempting to put the object in his right outer jacket pocket." Unable to see the object clearly, the officer testified that he thought it was a "handgun."[2] The officer related what happened after their unmarked squad car passed Wilder:

> [H]e continued having problem [*sic*] putting the object in -- in his right outer pocket, and right when we were in front of him he turned away from our direction. He turned eastbound more, and that at that time I notified my partner that I thought he had a gun.

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[1] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. Section 971.31(10), STATS.

[2] The following is an excerpt from the officer's testimony:

> Q What did you believe the object that you saw the defendant attempting to put into his right pocket to be?
>
> A A handgun.

Later, in response to a question on cross-examination, the officer further explained his analysis of the situation as he saw it: "It was a dark object that I thought was a handgun because as soon as he saw us, he turned away from us so that I could not further see him putting the object in his pocket." Wilder conceded during his testimony that he "made eye-to-eye contact" with at least one of the officers as the squad car passed him.

The officers stopped Wilder and frisked him. They found two things: a computer-game black joystick in Wilder's right outer jacket pocket, and a loaded semi-automatic handgun in Wilder's left inside jacket pocket. According to the officer's testimony, he felt the objects that turned out to be the handgun and the joystick at the same time, during a whole-body frisk. Wilder testified, however, that the officer who patted him down found and removed the joystick first, and that the gun was found later.

The trial court concluded that the officers reasonably believed that Wilder might be armed, and that their stop of Wilder and their full pat-down of him (rather than just the right side of his jacket) was justified because, among other things, Wilder could have moved what the officers thought was a gun from one pocket to another.

II.

In reviewing an order granting or denying a motion to suppress evidence, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. RULE 805.17(2), STATS.; ***State v. Harris,*** 206 Wis.2d 242, 249, 557 N.W.2d 245, 248 (1996). We review *de novo* a trial court's conclusion whether a stop and search complied with the Fourth Amendment. ***Harris***, 206 Wis.2d at 249, 557 N.W.2d at 248.

It is settled beyond controversy that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). Moreover, the officer may frisk the person for weapons if the officer is justified in believing that the person he or she confronts may be armed. ***Id.***, 392 U.S. at 24–27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Id.***, 392 U.S. at 27. *See also* ***United States v. Clark***, 24 F.3d 299, 304 (D.C. Cir. 1994). The test is objective. ***Florida v. Royer***, 460 U.S. 491, 498 (1983). Stated another way, the frisk is lawful when "a reasonably prudent person in the circumstances of the officer would be warranted in the belief that the action taken was appropriate." ***State v. Anderson***, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990).

Here, the trial court found that "[f]rom what [the officer] can see, [the object with which Wilder was struggling was] a weapon." The trial court also found that Wilder turned, so that "his back is to the street away from the observations of [the officers] and others that may be on the street." Unfortunately, however, in wide-ranging comments that the trial court admitted did not "have a whole lot to do with this case," the trial court discussed Wilder's race, that drugs and guns often go together, that, in the trial court's experience, some "90 to 95 percent of the people I saw arrested with possession of drugs with intent to deliver were black," and that "a large percentage of these people had either access to a weapon or carried a weapon." Wilder seizes upon these remarks, and argues that the trial court's determination that the officers' stop and frisk of Wilder was

reasonable "appears to be based in part upon racial stereotypes." (Uppercasing omitted.)

As noted, the trial court prefaced its remarks about race, drugs, and guns by recognizing that the comments did not "have a whole lot to do with this case." We go further—those comments have *nothing* to do with this case. First, there is no evidence in this record either that Wilder was involved with drugs or that the officers suspected that he was. Second, we repudiate any inference that might be gleaned from the trial court's remarks that race has anything to do with crime, or that the police or courts may take race or ethnic heritage into account in determining either whether someone should be stopped for questioning or whether reasonable belief or probable cause exists to believe that criminal activity is afoot—unless, of course, a specific suspect is described by his or her ethnic or racial characteristics for the purpose of identification. Indeed, "[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted." ***Maryland v. Buie***, 494 U.S. 325, 334–335 n.2 (1990).

Wilder's race has nothing to do with this case. This was no random stop of a person because of race. The officer testified that he believed that Wilder had a gun. The trial court found that this was true. This finding is fully supported by the evidence and is not, by any stretch of the imagination, "clearly erroneous." *See* RULE 805.17(2), STATS. Moreover, the officer testified that he had this belief *before* Wilder seemed to avoid the officers' scrutiny as well as after.[3] This, too, is

[3] Wilder's avoidance of the officers' scrutiny is material even though there is nothing in the record indicating that Wilder knew that the men were police officers. A person attempting to hide a gun in his pocket would naturally seek to avoid scrutiny by *anyone*—police officer or not. Indeed, the trial court specifically found that Wilder turned so that "his back is to the street away from the observations of [the officers] and *others that may be on the street*." (Emphasis added.)

encompassed by the trial court's decision. *See* ***State v. Echols***, 175 Wis.2d 653, 672, 499 N.W.2d 631, 636 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the trial court."), *cert. denied*, 510 U.S. 889. Additionally, as the trial court recognized, the officers were justified in doing a full outer-clothing frisk because the gun they thought they saw could have been anywhere on Wilder's body.

Under ***Terry*** and its progeny, the officers were not only justified in stopping Wilder to see if in fact he did have a gun, but, indeed, we believe that they were required by their responsibilities as law-enforcement officers to do so: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." ***Adams v. Williams***, 407 U.S. 143, 145–146 (1972) (internal citations omitted).

Just as it would have been "poor police work indeed," for the police officer in ***Terry*** to have ignored the men who were casing the store, ***Terry***, 392 U.S. at 23, it would have been poor police work here if the officers, believing that Wilder was trying to pocket a handgun, had thought: "Hey, that guy over there looks like he has a gun that he's trying to get in his pocket. But we did not actually see the object clearly enough to be positive that it is a gun, so let's move on without asking him about it." The officers here should be commended not criticized; as in ***Terry***, their good police work has captured a criminal.

By the Court.—Judgments affirmed.

Publication in the official reports is not recommended.