COURT OF APPEALS
DECISION
DATED AND RELEASED

October 15, 1996

No. 96-1286-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Catina A. McCoy,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

SCHUDSON, J.[1] Catina A. McCoy appeals from the judgment of conviction, following her guilty plea, for possession of marijuana. She argues that the trial court erred in denying her motion to suppress evidence. This court affirms.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

The facts relevant to resolution of this appeal are not in dispute. At about 1:00 p.m. on October 24, 1995, City of Milwaukee police officers arrived at the residence located at 3462 N. Richards Street to execute a search warrant for cocaine, drug paraphernalia, guns and other weapons. The warrant also authorized the search of a man nicknamed "T," described in the search warrant.

Before executing the search warrant, the officers discussed who "T" might be. Officer John Bryda testified that, based on his previous contacts, he believed "T" was a man known as "Cigar" who "either stays at that residence or ... is often in front of that residence." Bryda testified that when they arrived, he saw Cigar "standing on the street almost directly across the street [from 3462 N. Richards] with three other subjects." Bryda identified McCoy as one of the three others, "[s]tanding within two or three feet of [Cigar] with the other two subjects." He said that "[a]ll four subjects appeared to be in conversation."

Officer Bryda and Officer Kenneth Smith testified that they and Officer Susan Becker patted down all four subjects for weapons.[2] They did so, as Officer Bryda explained, because they "had been advised that there were possibly weapons involved in the house at 3462," and that such pat-down searches were standard procedure in search warrants of this nature, "for our safety." Officer Smith confirmed that he had been informed that guns were "[o]n the premises or with the people involved with this house." Searching McCoy, Officer Becker recovered a soda bottle and a "philly blunt" -- a cigar wrapper containing marijuana.

McCoy argues that the search was unlawful because she was not a named target of the search warrant, she was not on the premises to be searched, and the police had no information that she might be carrying a weapon.

[2] According to Bryda and Smith, Becker frisked McCoy. Officer Becker, however, did not testify at the suppression hearing because she was on vacation. McCoy, however, does not raise any issue regarding the sufficiency of evidence of *McCoy's* reasonable belief as distinguished from that of the officers who testified.

The supreme court has explained:

> A frisk is a search. The fourth amendment does not proscribe all searches, only unreasonable searches. In order to determine whether a search is reasonable, we balance the need for the search against the invasion the search entails.
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> In ***Terry [v. Ohio***, 392 U.S. 1 (1968)], the Court applied this balancing test to determine the legality of an on-the-street frisk of a person suspected of casing a robbery location. The Court first considered the need for the search, *emphasizing the need for police to protect themselves from violence*:
>
> > [T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.
>
> The Court then balanced the need for police protection against the intrusion on individual rights which a frisk entails. Although the Court viewed a frisk as "a severe, though brief, intrusion upon cherished personal security" and an "annoying, frightening, and perhaps humiliating experience[,]" the Court held that when an officer has a reasonable suspicion that a suspect may be armed, the officer can frisk the suspect for weapons.

> The facts of each case determine the reasonableness of the frisk, and we judge those facts against an objective standard.
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> 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.... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.
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> In the years since the Court decided ***Terry***, the Court has applied the ***Terry*** standard to different facts. *The constant refrain in these cases has been that the need for police to protect themselves can justify a limited frisk for weapons.*

State v. Guy, 172 Wis.2d 86, 93-95, 492 N.W.2d 311, 313-314 (1992) (citations omitted; emphasis added), *cert. denied*, 509 U.S. 914 (1993).

In assessing whether police *reasonably* suspected that a person might be armed, this court must determine, from an objective viewpoint, whether the facts, reasonable inferences from the facts, and surrounding circumstances confronting the police justified the frisk. ***State v. Richardson***, 156 Wis.2d 128, 143-144, 456 N.W.2d 830, 836 (1990). Here, where the facts are undisputed, this court reviews the trial court's legal conclusion *de novo*. ***State v. Goodrum***, 152 Wis.2d 540, 546, 449 N.W.2d 41, 44 (Ct. App. 1989).

The parties offer interesting arguments comparing the instant case to both ***Guy*** and ***State v. Flynn***, 92 Wis.2d 427, 285 N.W.2d 710 (1979), *cert*

denied, 449 U.S. 846 (1980). Although both ***Guy*** and ***Flynn*** differ from this case in some important respects, they do guide the analysis of whether the frisk of McCoy was reasonable.

In ***Guy***, a divided supreme court concluded that police had reasonable suspicion that the defendant, an occupant of the residence where police were executing a search warrant for drugs and weapons, might be armed. The court explained:

> One of the reasons this belief would be reasonable is that weapons are often "tools of the trade" for drug dealers. This court has recognized that "[t]he violence associated with drug trafficking today places law enforcement officers in extreme danger."

Guy, 172 Wis.2d at 96, 492 N.W.2d at 315 (citations omitted). The court emphasized that it was not placing "a constitutional imprimatur on the Milwaukee Police Department's policy of automatically frisking everyone present for weapons while executing a search warrant for drugs in a private residence," and that "[t]he constitutionality of each such frisk will continue to depend upon its facts." ***Id***. at 100, 492 N.W.2d at 316.

McCoy argues that her circumstances are distinguishable from those in ***Guy*** and that her case is more closely aligned with ***Ybarra v. Illinois***, 444 U.S. 85 (1979), in which the Supreme Court concluded that a search warrant of a bar and bartender did not provide a proper basis to search others in the bar. The Court explained that the "'narrow scope' of the ***Terry*** exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." ***Ybarra***, 444 U.S. at 93-94. McCoy emphasizes that her case, like ***Ybarra***, involves the search of a person in a public place who was not the target of the search warrant. Moreover, McCoy correctly argues, the public place where she was searched was not even the targeted premises of the search warrant.

The State cogently counters:

Unlike ***Ybarra***, in which mere propinquity of persons in a bar suggested nothing concerning any knowledge of or relationship with the individual targeted in the search warrant, here the fact that [McCoy] was seen on the street talking with the targeted individual near the dwelling also targeted for the search for weapons gave the officers reasonable suspicion that [McCoy] knew the targeted individual, might also just have come from the targeted dwelling and might therefore also be armed.

> ....
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> ... People in a bar can arrive as strangers, drink as strangers and leave the bar still strangers; people on the street generally do not strike up conversations in small groups with strangers.
>
> The officers were thus aware not only of McCoy's proximity to the targeted dwelling and ... the targeted individual, but also that she and the others were in both physical proximity to that individual and in conversation with him under circumstances suggesting previous association.

This court agrees with the State. Although it is possible that, outside rather than inside a targeted residence, a police officer might feel somewhat more at ease in the presence of an apparent acquaintance of a search warrant's targeted individual, the difference, if any, is slight. Under ***Guy***, it is not clear what circumstances would preclude police from frisking those present at the execution of a drug search warrant in a private residence. Thus, it appears that under ***Guy***, McCoy would have been subject to a frisk had she and Cigar been inside the residence. Only a foolish officer would *not* have maintained the same reasonable suspicion of those with Cigar, merely because they were with him outside the residence.

Flynn offers a somewhat separate line of analysis. ***Flynn*** holds that under some circumstances a police stop and frisk of a person in the presence of a criminal suspect may be lawful. ***Flynn***, 92 Wis.2d at 434-436, 285

N.W.2d at 713-714. Significantly for the instant case, the court, quoting ***United States v. Berryhill***, 445 F.2d 1189, 1193 (9th Cir. 1971), wrote:

> "It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."

Flynn, 92 Wis.2d at 436, 285 N.W.2d at 713-714.

The instant case, coming at the intersection of ***Guy*** and ***Flynn***, matches neither exactly but resembles both in important ways. This court concludes that the evaluation of whether police suspicion of McCoy was reasonable reduces to a common-sense question: If you were a police officer executing a search warrant for drugs and guns at a residence, and if you saw the targeted individual of that search warrant across the street, and if you saw three persons in conversation with him, and if you had been informed that guns were on the premises or the people "involved with this house," would you feel safe searching only the individual named in the warrant while his three apparent associates looked on? The answer is clear and, accordingly, this court affirms the trial court's denial of McCoy's motion to suppress evidence.

By the Court. – Judgment affirmed.

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