

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 1, 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. 96-1403-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Thadous L. Beard,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Thadous L. Beard appeals from a judgment of conviction entered after he pled guilty to one count of carrying a concealed weapon, contrary to § 941.23, STATS. Beard claims the trial court erred in denying his motion to suppress because the police officer's reach into his pocket

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

exceeded the permissible scope of a search pursuant to a *Terry* stop.² Because the officer's search was constitutionally permissible, this court affirms.

I. BACKGROUND

On April 8, 1995, at approximately 9 p.m., City of Milwaukee Police Officers Bradley Kust and Kevin Porter were on routine patrol in the area of the 2900 block of North Avenue in Milwaukee. They observed two cars in a vacant lot and noticed that one of the individuals in the car appeared to be drinking.

As they approached the cars, Beard exited one of the vehicles and walked toward Officer Kust. As Beard approached, he repeatedly reached into his right front jacket pocket. Beard was ordered to keep his hands where they could be observed. Beard continued to keep his hand in his pocket.

Officer Kust drew his service revolver and again ordered Beard to remove his hand from his pocket. Beard complied. Officer Kust was able to see that Beard had a heavy object in his right front pocket, which caused the jacket to shift to the right from the weight. Suspecting that the heavy object was a gun, Officer Kust reached into Beard's pocket and removed a loaded semi-automatic pistol.

Beard was charged with carrying a concealed weapon. He moved to suppress the evidence, but his motion was denied. He pled guilty and judgment was entered. He now appeals.

II. DISCUSSION

A trial court's findings regarding the suppression of evidence must be upheld unless they are clearly erroneous. *See State v. Richardson*, 156

² *See Terry v. Ohio*, 392 U.S. 1 (1968).

Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether statutory and constitutional standards are satisfied are questions of law that this court reviews *de novo*. *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Beard concedes that the circumstances surrounding this incident were sufficient to satisfy the requirements justifying a *Terry* stop. He argues, however, that the reach into his pocket without first performing a pat-down search was unconstitutional. This court disagrees.

According to *Terry*, a search incident to an investigatory stop must be confined to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry v. Ohio*, 392 U.S. 1, 29 (1968). This court agrees with Beard that in most circumstances, the search should begin with a pat-down rather than the more intrusive reach directly into an individual's pocket. Nevertheless, limited exceptions to the initial pat-down must be recognized so that an officer may adequately protect himself. See *Adams v. Williams*, 407 U.S. 143, 147 (1972).

This court concludes that the search here constitutes one such exception. After examining the totality of the circumstances facing Officer Kust in this case, this court concludes that the reach into Beard's pocket without first performing a pat-down was not unconstitutional. The facts supporting this conclusion include the fact that Beard was approaching the officer and repeatedly reaching into his pocket, that Beard disregarded the officer's initial order to keep his hands where they could be seen, that the officer observed a heavy object in Beard's pocket which the officer suspected was a gun, and that the officer feared for his own safety. Had Officer Kust performed a pat-down prior to reaching directly for the gun, Beard may have had an opportunity to create a much more dangerous situation.

Accordingly, this court concludes that Officer Kust's action in reaching into Beard's pocket where a gun was thought to be hidden constituted a limited intrusion designed to insure the safety of the officers and therefore

was reasonable.³ The trial court properly denied Beard's motion to suppress and, therefore, this court affirms.

By the Court. – Judgment affirmed.

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

³ This court does acknowledge that part of the trial court's reasoning in denying the motion to suppress was erroneous. Specifically, it was inappropriate for the trial court to rule that because a gun (rather than other contraband) was actually discovered during the search, the search was constitutionally permissible. Nevertheless, the trial court's conclusion in denying the motion to suppress was the right result and this court therefore affirms the judgment. See *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).