COURT OF APPEALS DECISION DATED AND RELEASED

January 14, 1997

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. 96-2610-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN G. LOVEDAY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed*.

FINE, J. Steven G. Loveday appeals from a judgment, entered on a guilty plea, convicting him of unlawfully carrying a concealed weapon. *See* § 941.23, STATS. He claims that the trial court erred in not granting his motion to suppress evidence.[1]

[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.

I.

This case arises out of an investigation by Milwaukee police officers of a report that there was gambling at a tavern. Five officers entered the tavern. One of the officers testified at the suppression hearing that he saw Loveday sitting at the bar, having a drink. The officer told the trial court that he went over to Loveday because "I wanted to ask him if he had any information regarding any gambling that might be going on." The officer testified that Loveday was "acting real nervous" so he asked Loveday "if I could check him for any weapons for both of our safeties [*sic*], and he said sure." According to the officer, Loveday then "took off his black leather jacket and handed it to me." The officer told the trial court that he hadn't asked Loveday for the jacket, "but that's what he had done. [*sic*]" The officer found a small semi-automatic, loaded gun in the jacket. According to the officer, Loveday then blurted out, as phrased by the officer: "I live on 7th and Mitchell, what do you expect."

Subsequently, another officer interviewed Loveday who told him that he had consented to the search and that he gave his jacket to the other officer voluntarily because he had forgotten that the gun was there; according to Loveday's post-arrest statement he put the gun in his jacket because children were visiting his home and he did not want them to find the gun.

Loveday testified at the suppression hearing that the officer asked "if he could search me," and that he consented because, in essence, he believed that he had no choice. He also said that he knew that the gun was in the jacket, but "handed it [the jacket] to him [the officer] because I didn't want to get my face smashed on the bar."

The trial court credited the officers' testimony as bolstered by Loveday's post-arrest statement, and found that Loveday consented to the search.

II.

In reviewing a trial court's order denying a defendant's motion to suppress evidence, we uphold the trial court's findings unless they are "clearly erroneous," *see* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS.; ***State v. Harris***, Nos. 95-1595-CR & 95-1596-CR, slip op. at 5-6 (Wis. Dec. 27, 1996). The trial court's legal conclusions are, however, reviewed *de novo*. *See* ***Harris***, at 6. Certain legal issues are so intertwined with the underlying facts, however, that the trial court's legal conclusions on those issues are entitled to weight. *See* ***Ballenger v. Door County***, 131 Wis.2d 422, 427, 388 N.W.2d 624, 628 (Ct. App. 1986).

Although people have a Fourth Amendment right not to be stopped and searched, *see* ***Harris***, at 15, consensual interactions between law enforcement officers and the public do not trigger Fourth Amendment scrutiny, ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Thus, police officers may approach, question, and request to search luggage of persons in public places—"even when officers have no basis for suspecting a particular individual," "as long as the police do not convey a message that compliance with their requests is required." ***Bostick***, 501 U.S. at 434–435. In ***Bostick*** two uniformed and armed law enforcement officers boarded an interstate bus at one of its stops. ***Id.***, 501 U.S. at 431. The issue was whether the officers' request to search a bus passenger's luggage could be consensual given the passenger's subjective view that he was not free to either leave the bus or refuse consent. ***Ibid.*** The Court held that the test was objective: what a reasonable "*innocent* person" would believe. ***Id.***, 501 U.S. at 438 (emphasis in original). This is the same test employed by ***United States v. Mendenhall***, 446 U.S. 544, 553–554 (1980) (Stewart, J., announcing judgment of Court in an opinion in which, as relevant here, was joined in by Rehnquist, J.), upon which Loveday relies.

We see no principled distinction between the bus in ***Bostick*** and the tavern in this case. Indeed, given the differences between the physical configurations of buses and taverns, a reasonable innocent person would be more likely to believe that he or she was free to refuse an officer's search request in a tavern than on an interstate bus that would soon depart. In this case, the trial court found that Loveday handed his jacket to the officers voluntarily. There was no pre-arrest pat-down or search of Loveday's person. The trial court's finding is supported by not only the police officer's testimony but also by Loveday's post-arrest statement. It is also supported by the evidence that Loveday did not realize the gun was in the jacket. As ***Bostick*** recognized, it is less likely that a consciously guilty person would consent to a search voluntarily

than a person who thought that he or she had nothing to hide. ***Id.***, 501 U.S. at 437–438. There is nothing in the record before this court that persuades us that the trial court's finding that Loveday consented to the search of his jacket voluntarily is "clearly erroneous."

By the Court.—Judgment affirmed.

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