COURT OF APPEALS
DECISION
DATED AND RELEASED

June 11, 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. 96-3569-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID R. OLOFSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: JOHN W. MICKIEWICZ, Judge. *Affirmed.*

NETTESHEIM, J. David R. Olofson appeals from a judgment of conviction for carrying a concealed weapon contrary to § 941.23, STATS. Olofson additionally appeals from the trial court's order denying postconviction relief. On appeal, Olofson challenges the constitutionality of the search of his car. We conclude that the police possessed a reasonable suspicion that Olofson committed or was committing a crime. Therefore, under ***Terry v.***

Ohio, 392 U.S. 1 (1968), the police were entitled to stop Olofson and detain him. We further conclude that the resulting search of Olofson's car was justified. The trial court did not erroneously deny Olofson's motion to dismiss based on an unlawful stop and search.

Olofson also argues that he was in custody and under interrogation during the stop and search of his car and thus, the officers failed to give the requisite ***Miranda***[1] warning. Because the facts of this case do not present a ***Miranda*** situation, we conclude that the trial court did not erroneously deny Olofson's motion to suppress physical evidence and statements made during the search. Accordingly, we affirm the conviction and the order denying postconviction relief.

FACTS

On November 3, 1994, the police obtained a search warrant for Olofson's residence and garage. The warrant was based upon the affidavit of Special Agent Michael Quick. Quick stated that he had been informed that Olofson possessed various weapons including hand grenades and explosives. The informant provided Quick with a videotape depicting Olofson involved in a "paramilitaristic field exercise" at a friend's farm. Quick also stated that the videotape showed Olofson's vehicle, a gray Jeep Cherokee. The informant told Quick that Olofson used the vehicle to transport various explosives, firearms and bombs. The informant stated that the materials for manufacturing plastic explosives would be located either at Olofson's residence or in his vehicle.

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Prior to the search of Olofson's residence on November 4, 1994, a detective watched the residence so the police would know who was on the premises. While the police were preparing to execute the warrant, they were notified that Olofson's Jeep was seen leaving the residence. The detective followed Olofson to his fiancee's home. When Olofson and his fiancee, Candace Russell, exited her townhouse and entered Olofson's vehicle, two police officers approached them with drawn weapons. At the officers' request, Olofson and Russell exited the vehicle with their hands in the air. The officers searched Olofson and pulled off his jacket, causing bullets and a bullet clip to fall out of his jacket pocket. The officers then asked Olofson if he had any weapons in the vehicle. Olofson testified that he informed the officers that he had a gun lodged between the seats. The officers searched the vehicle twice, removed the seatcovers and found nothing. The officers instructed Olofson to retrieve the weapon. Olofson removed a "twenty-five automatic" from between the seat cushions and gave it to the police.[2] Olofson was arrested for carrying a concealed weapon. He was then escorted to his residence, at which time the police executed the search warrant.

On June 23, 1995, Olofson was charged with carrying a concealed weapon contrary to § 941.23, STATS. Olofson pled not guilty and the matter was scheduled for jury trial. Olofson filed pretrial motions to dismiss because the stop and search of his vehicle was unlawful and motions to suppress physical evidence and statements made by Olofson during the search of his vehicle. At the motion

[2] We note that there is a factual dispute as to who actually retrieved the weapon. Olofson testified that he retrieved the weapon from between the seats at the officers' request. The State's brief and the criminal complaint state that the .25 caliber handgun was recovered by officers conducting the search. This factual dispute does not affect our analysis.

hearing, Olofson argued that the search of his vehicle was unreasonable and violated the terms of the search warrant. The State argued that the stop and patdown was governed by ***Terry*** and that once the patdown revealed evidence of a weapon, the police were justified in searching the vehicle.

The trial court agreed with the State that the situation was not an unreasonable extension of the warrant, but rather a ***Terry*** stop. The trial court denied Olofson's motions concluding that "at the time of this Terry Stop the officers had probable cause and reason to believe that [Olofson], when being confronted, might be armed and dangerous, in that sense it was appropriate to within the Terry Stop to pat [Olofson] down." The court went on to find that the discovery of the bullet clip justified a further search of the vehicle. The trial court additionally rejected Olofson's ***Miranda*** argument because the conversation was limited to inquiries as to the location of the gun and the statements were not coerced.

Following a jury trial, Olofson was found guilty of carrying a concealed weapon. Olofson filed a postconviction motion requesting the court to reconsider his pretrial motions and grant a new trial. His postconviction motion was denied. Olofson appeals.

DISCUSSION

We begin by addressing Olofson's argument that the search of his vehicle was an unreasonable extension of the search warrant for his residence and garage. The trial court, in considering this same argument, concluded that the search warrant had nothing to do with the search of Olofson's vehicle and should be "put aside completely." We similarly reject this premise of Olofson's appeal.

The issue of whether the police were entitled to stop Olofson and search his vehicle is properly governed by the Court's ruling in ***Terry***.

When reviewing a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, whether a stop satisfies constitutional and statutory standards is a question of law subject to de novo review. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Olofson contends that the warrant authorizing a search of his residence and garage did not provide an independent basis for searching his person. Although Olofson cites to ***Michigan v. Summers***, 452 U.S. 692, 705 (1981), for the proposition that the police have a right to detain the occupant of the premises to be searched, he argues that the police did not have a right to detain him in this case because he was not near the premises at the time the search was to be executed. In support of this argument, Olofson cites to ***United States v. Sherrill***, 27 F.3d 344 (8th Cir. 1994), and ***United States v. Hogan***, 25 F.3d 690 (8th Cir. 1994). Olofson's reliance on these cases is misplaced.

While it is true that the courts in ***Sherrill*** and ***Hogan*** concluded that a detention could not be justified under ***Summers*** when the suspect is not near the residence at the time of the search, the courts went on to examine the validity of the detentions on the basis of probable cause. *See* ***Sherrill***, 27 F.3d at 346-47; ***Hogan***, 25 F.3d at 693. In ***Sherrill***, the court affirmed Sherrill's conviction, concluding that the officers had probable cause, independent of the search warrant, to arrest Sherrill based on corroborated information from a reliable informant that Sherrill was selling crack. *See* ***Sherrill,*** 27 F.3d at 347.

In ***Hogan***, the police obtained a warrant to search the defendant's residence and truck. The warrant was based on an affidavit which specifically stated that the defendant kept narcotics in his home or in a "white colored 1990 Dodge pickup truck …." *See* ***Hogan***, 25 F.3d at 691. When the police stopped the defendant and searched his vehicle, he was driving a "blue 1987 Oldsmobile Cutlass." *See* ***id***. at 692. The court concluded that "probable cause did not exist to stop and search the Oldsmobile.... All the information the agents possessed indicated that Hogan transported drugs to work in his truck and that the truck was the sole vehicle he drove to and from work." *See* ***id***. at 693.

Olofson argues, correctly, that under ***Sherrill*** and ***Hogan***, a ***Summers*** detention was not appropriate in this case. However, Olofson overlooks that both ***Sherrill*** and ***Hogan*** proceed to address the validity of the stop on the basis of probable cause. As stated above, we similarly conclude that the stop and search of Olofson's vehicle requires an evaluation independent of the search warrant.

We begin our evaluation of Olofson's claim by noting that the State does not contend that the officers had probable cause to arrest Olofson at the time of the stop but, rather, that they possessed a reasonable and articulable suspicion that Olofson might be armed. However, Olofson's brief does not address the validity of the stop under ***Terry***. The State contends, and we agree, that the constitutional validity of the investigatory stop is governed by ***Terry***.[3] We

[3] We note that in support of its argument that the stop and search of Olofson's vehicle was lawful, the State additionally cites to the Wisconsin statutes which codify the Court's decision in ***Terry v. Ohio***, 392 U.S. 1 (1968). *See* §§ 968.24 and 968.25, STATS.

therefore turn to whether, under the facts of this case, the police were justified in stopping Olofson and conducting a search of his person and vehicle.

Terry requires that before stopping an individual, a police officer must reasonably suspect that criminal activity has taken place or is taking place. *See* ***Terry***, 392 U.S. at 30. An officer's reasonable suspicion must be grounded in specific, articulable facts and reasonable inferences arising from those facts. *See* ***id***. at 21-22.

Here, the police had information that Olofson carried concealed weapons in his vehicle and on his person. The information was provided by a citizen informant who provided the police with a videotape confirming his statements. Based on the informant's statements and the videotape, the State argues that the officers had "articulable facts supporting a reasonable suspicion" that Olofson committed the crime of manufacturing illegal explosives and was committing the crime of carrying a concealed weapon. We agree. Our supreme court has held that:

> [T]he corroboration by police of innocent details of an anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a stop. The corroborated actions of the suspect, as viewed by police acting on an anonymous tip, need not be inherently suspicious or criminal in and of themselves. Rather, the cumulative detail, along with reasonable inferences and deductions which a reasonable officer could gleen therefrom, is sufficient to supply the reasonable suspicion that crime is afoot and to justify the stop.

See ***State v. Richardson***, 156 Wis.2d 128, 142, 456 N.W.2d 830, 835 (1990). Here, the officers knew the identity of the informant and viewed a videotape of his activities. The officers also knew the make and color of Olofson's vehicle and the location of his residence. Based on the information offered by the informant, we

conclude that the police had a reasonable and articulable suspicion and thus the stop of Olofson's vehicle was justified under ***Terry***. *See also* § 968.24, STATS.

We further conclude that once the officers stopped Olofson they were entitled to frisk him. The officers stopped Olofson based on a reasonable suspicion that he was carrying a concealed weapon. Therefore, the officers had reason to believe Olofson might be armed. If an officer believes a suspect to be armed and dangerous, the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing … in an attempt to discover weapons which might be used to assault him." ***Terry***, 392 U.S. at 30-31; *see also* ***State v. Moretto***, 144 Wis.2d 171, 178, 423 N.W.2d 841, 843-44 (1988); § 968.25, STATS.

The search of Olofson's outer clothing revealed a bullet clip and bullets. The State argues that this evidence provided the officers with probable cause to believe Olofson had committed the crime of carrying a concealed weapon and thus, the search of his car was reasonable. We agree. The supreme court has held that:

> Because the extension of the ***Terry*** search for weapons to the passenger compartment of a vehicle is consistent with the policy objective of protective searches and constitutional jurisprudence on search and seizure, we conclude that such vehicle searches are constitutionally permissible.

Moretto, 144 Wis.2d at 182, 423 N.W.2d at 845. We conclude that once the bullet clip and bullets were discovered during the frisk, the officers acted reasonably in searching the vehicle for weapons. We further conclude that the trial court's denial of Olofson's motion to suppress on these grounds was not erroneous.

Olofson next challenges the court's suppression ruling arguing that he was in custody and under interrogation at the time of the seizure and thus, should have been given a ***Miranda*** warning. The State argues that, regardless of whether Olofson was in custody, the intention of the police in questioning Olofson was to secure their safety, not to elicit a confession; therefore, ***Miranda*** concerns do not apply. Because we agree that the facts of this case do not present a ***Miranda*** situation, we conclude that the evidence resulting from the search and Olofson's statements made during the search need not be suppressed.

As did the first issue, this question involves the application of constitutional principles to a set of facts. We decide such questions de novo. *See* ***State v. Esser***, 166 Wis.2d 897, 904, 480 N.W.2d 541, 544 (Ct. App. 1992).

Olofson argues that "[u]nder these circumstances—held at gun point, frisked and being questioned by a police officer with numerous other officers present—a reasonable person would have considered himself to be in custody." From this, Olofson concludes that he was entitled to a ***Miranda*** warning prior to the police inquiries regarding the location of the gun. However, even if we accept—as did the State in the trial court—that Olofson was in custody at the time of the search, we nevertheless conclude that the officers were entitled to make limited inquiries as to the location of Olofson's weapon.

In ***State v. Stearns***, 178 Wis.2d 845, 852, 506 N.W.2d 165, 168 (Ct. App. 1993), we held that if the police are not actively seeking to obtain a confession but rather are attempting to secure a potentially dangerous situation, the concerns of ***Miranda*** are not implicated. This is true even if the suspect is "technically" in custody and under interrogation at the time the statements are made. *See* ***Stearns,*** 178 Wis.2d at 854, 506 N.W.2d. at 168.

The facts of this case present such a situation. Olofson was suspected of carrying a concealed weapon. Upon frisking Olofson, a bullet clip and bullets were discovered. At the suppression hearing, Officer Fink, who conducted the search, testified that, "[W]hen I lifted up the back of his jacket, a magazine or a clip … fell out and hit the ground and I recognized that to be … from a .25 caliber automatic handgun, which was in fact the same caliber handgun that the informant told us Mr. Olofson would carry." The potential danger posed by this kind of situation was discussed in ***Moretto***. There the court recognized that "roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect who is stopped for questioning by the police." *See* ***Moretto***, 144 Wis.2d at 179-80, 423 N.W.2d at 844.

Based on the facts of this case, we conclude that the police inquiries as to the location of the gun were aimed not at eliciting a confession from Olofson but rather at diffusing a potentially dangerous situation. We affirm the trial court's denial of Olofson's motion to suppress his statements and the physical evidence on this ground.

CONCLUSION

We conclude that the stop and search of Olofson's vehicle was premised upon a reasonable suspicion that Olofson committed or was committing an offense. The stop was thus lawful under ***Terry***. The trial court properly denied Olofson's motions to dismiss for an unlawful stop and search. We further conclude that the facts of this case did not implicate ***Miranda*** concerns. The trial court properly denied Olofson's motions to suppress the statements and the physical evidence resulting from the search. Accordingly, we affirm the trial court's denial of Olofson's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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