COURT OF APPEALS
DECISION
DATED AND RELEASED

July 8, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0449-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN A. MOSLEY, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

FINE, J. John A. Mosley, Sr., appeals from a judgment entered on a guilty plea, convicting him of possession of cocaine. *See* §§ 961.16(2)(b)1 &

961.41(3g)(e), STATS. The only issue on appeal is whether the trial court erred in not granting Mosley's motion to suppress the cocaine.[1] We affirm.

I.

Shortly after midnight in July of 1996, Milwaukee police officers went to Mosley's neighborhood to look for a woman whom they wanted to question in connection with a recent homicide in the area. Mosley and three of his sons were outside the Mosley residence, which was across the street from where the woman was found. As the officers were waiting with the woman for her to be taken to police headquarters, she motioned to the Mosleys across the street and said, according to one of the officer's testimony: "'You should talk to those guys. They know what happened, they were there.'" The officer told the trial court that the detectives in charge then directed some of the officers to "conduct field interviews" of the Mosleys.

According to the officer's testimony, and as found by the trial court, when he walked over to the defendant, the officer was told by one of the other officers that "he had located a holster" on one of Mosley's sons and that "the holster was empty." At that point, the officer "patted" the defendant down "to guarantee that Mr. Mosley did not possess the weapon or any other weapon."

The officer testified that as he was patting down the defendant, he felt a "pouch that was soft" in Mosley's right front pants pocket, and that "inside the pouch" he felt "a tubular object that was hard," which he thought was "a cocaine base pipe." The officer pulled out the pouch, opened it, and discovered a

[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.

"clear tube which contained a white powdery substance which I believed to be cocaine." The substance was cocaine, and underlies the charge to which Mosley pled guilty. The officer did not have a search warrant, and Mosley did not consent to the search.

II.

The trial court's findings of fact essentially tracked the testimony of the police officer. We thus accept these findings because they are not clearly erroneous. *See* ***State v. Angiolo***, 186 Wis.2d 488, 494–495, 520 N.W.2d 923, 927 (Ct. App. 1994). We decide *de novo*, however, the legal issue of whether the frisk was lawful. ***Ibid.***

Officers may approach persons in a public place seeking information. A pat-down search for weapons is permitted under the Fourth Amendment of the United States Constitution, and under Article I, § 11 of the Wisconsin Constitution, when the officer is justified in believing that the person he or she confronts may be armed. ***Terry v. Ohio***, 392 U.S. 1, 24–27 (1968).[2] "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

[2] We interpret the parallel protections in Article I, § 11 of the Wisconsin Constitution consistent with the United States Supreme Court's interpretation of the Fourth Amendment. ***State v. Murdock***, 155 Wis.2d 217, 227, 455 N.W.2d 618, 622 (1990).

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 officer testified that a search of one of Mosley's sons revealed an empty holster.[3] He was justified in patting down the others to see if they had the gun. The officer did not have to risk a sudden confrontation with a weapon before assuring himself that Mosley was not armed. *See* ***State v. Richardson***, 156 Wis.2d 128, 143, 456 N.W.2d 830, 836 (1990) (legality of frisk is determined by reference to "the totality of the circumstances known to the officers at the time of the stop"). The pat-down search was lawful. Once the officer felt something that he immediately believed indicated the presence of cocaine, he was justified in retrieving that item. He did not need a search warrant. *See* ***Minnesota v. Dickerson***, 508 U.S. 366, 375–376 (1993); ***State v. Guy***, 172 Wis.2d 86, 100–102, 492 N.W.2d 311, 316–317 (1992). It is of no moment that the "pipe" turned out to be but a glass tube.[4]

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[3] As the trial court noted correctly, whether the search of Mosley's son—the search that turned up the empty holster—was lawful is not before us. *See* ***Rakas v. Illinois***, 439 U.S. 128, 134 (1978) (person may complain about Fourth Amendment violation only if own rights under the amendment have been violated). Mosley does not argue to the contrary on this appeal. *See* ***Schenkoski v. LIRC***, 203 Wis.2d 109, 115 n.3, 552 N.W.2d 120, 122 n.3 (Ct. App. 1996) ("An issue raised but not briefed or argued is deemed abandoned.").

[4] Mosley does not argue on this appeal that the officer was not justified in believing that the object he felt was, as he testified, "a cocaine base pipe," beyond, in his reply brief, contending that the record does not reveal much of the officer's experience. The officer's unobjected-to testimony that he was able to discern the nature of the object he felt was sufficient, however, to lay a proper foundation for his testimony. *See* ***James v. Heintz***, 165 Wis.2d 572, 579, 478 N.W.2d 31, 34 (Ct. App. 1991) (expert witness may "establish a proper testimonial foundation by his or her own testimony"). If Mosley believed that the officer had insufficient knowledge under RULE 907.02, STATS., he should have objected at the time so that a proper foundation, if possible, could have been established. *See* RULE 901.03(1)(a), STATS. (timely, specific object required to preserve alleged error).

By the Court.—Judgment affirmed.

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