COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1409-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE C. MCGILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Jose McGill appeals from a judgment convicting him on two felony drug charges. The State prosecuted McGill based on cocaine and marijuana seized during a ***Terry*** stop. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). The issue is whether the trial court properly denied McGill's motion to suppress that evidence. We affirm.

Officer Curt Wald of the Beloit City Police Department gave the following undisputed account at the suppression hearing. While on patrol duty, he saw a car go around a barricade and enter a road closed for repairs. Wald followed and flashed his emergency lights. After a couple of blocks, the car stopped in a driveway and McGill got out of the car and began to walk away. Wald approached and asked McGill for his license, which McGill provided. Wald then decided to conduct sobriety tests, because McGill smelled of intoxicants and marijuana. Before doing so, however, he searched McGill for weapons. The search was prompted by McGill's failure to stop immediately after Wald switched on his emergency lights, the smell of intoxicants, and McGill's noticeable signs of nervousness.

Before conducting the search, Wald ordered McGill to put his hands on top of the squad car. After beginning the search, McGill moved his hands toward his pockets at least three times. When Wald reached McGill's pants pockets he felt a hard oblong shaped object in the right pocket, that Wald thought could have been a pocketknife. When McGill said it was just change, Wald handcuffed him and removed the object. When it proved to be a tightly wrapped bag containing white powder, Wald arrested McGill. A subsequent search of McGill's car revealed a quantity of a green leafy substance. Subsequent testing confirmed that the seized powder consisted of thirteen grams of cocaine, and that the seized leafy substance was marijuana.

Based on the facts recited above, the trial court concluded that the seizure of the cocaine and marijuana did not violate McGill's Fourth Amendment rights. On appeal, McGill contends that Wald's initial search was unlawful because Wald did not have a reasonable suspicion that McGill was armed or that Wald was in danger. He further contends that even if the search was lawful, Wald

had no authority to remove the object from McGill's pocket, nor to open and examine it further once he determined it was not a weapon. The remainder of this opinion addresses those issues.

Wald lawfully searched McGill. During a ***Terry*** stop an officer may carefully search the outer clothing of an individual to discover weapons if "nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety." ***Terry***, 392 U.S. at 30. To establish that the search was reasonable and therefore constitutional, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21. Here, McGill failed to immediately stop when Wald turned on his lights. When he did stop he began walking away from the car. He was very nervous and smelled of alcohol and marijuana. After the initial contact, Wald decided to conduct sobriety tests. At that point, Wald could reasonably infer that McGill's concern was something far greater than a citation for a minor traffic violation, or even for driving while intoxicated. Having drawn that inference, Wald could also reasonably conclude that McGill might resist if the encounter was prolonged. The search was therefore a reasonable and constitutional cautionary measure.

Wald lawfully removed the wrapped bag from McGill's pocket. The cocaine powder in McGill's pocket was wrapped tightly enough that it felt very hard to the touch. Wald described it as being in the shape of a pocket knife. When Wald initiated the search, McGill dropped his hands toward his pockets three times. After Wald discovered the object, McGill told him an obvious lie about what it was. Under these circumstances, Wald reasonably concluded that the object could be a weapon. That justified removal, not withstanding the fact that Wald handcuffed McGill before removal. *See* ***State v. Murdock***, 155 Wis.2d

217, 231, 455 N.W.2d 618, 624 (1990) (actual accessibility of the weapon is not test for determining lawful scope of search incident to arrest); *see also* ***United States v. Taylor***, 716 F.2d 701, 709 (9th Cir. 1983) (officer may conduct ***Terry*** search where suspect is handcuffed and prone.).

McGill also contends that Wald could have determined that the package was not a weapon without removing it from his pocket. We are not persuaded that Fourth Amendment law requires an officer, during a ***Terry*** search, to conduct further examination inside a suspect's pocket once a weapon-like object is located during the external pat-down.

Wald lawfully opened and examined the package once he removed it. As McGill notes, the State cannot reasonably contend that Wald still thought the package was or contained a weapon after removing it. However, Wald, an experienced officer, could have reasonably concluded from what he saw that the bag contained an illegal substance. Police need not ignore evidence of a crime inadvertently discovered during a pat-down. ***State v. Washington***, 134 Wis.2d 108, 123, 396 N.W.2d 156, 162 (1986). If, during a ***Terry*** search, an officer finds what is reasonably believed to be contraband, its seizure and subsequent arrest of the possessor is lawful. *See* § 968.25, STATS.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.