COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2624-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRANKO CVOROVIC

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] A jury convicted Branko Cvorovic of possessing marijuana and cocaine, both misdemeanors. Cvorovic contends that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the trial court erred by denying his motion to suppress evidence of the search of the pocket, which turned up the marijuana, and the resultant search of his automobile incident to his arrest, which resulted in finding cocaine. In particular, he claims that there was no basis for a weapons frisk following a routine traffic stop, no basis for the officer to stick his hand inside Cvorovic's pocket during the frisk, and no basis to search his car. We hold that Cvorovic's actions justified a weapons frisk, that he failed in his burden to produce facts supporting his theory of law regarding the search of the pocket, and that the search of the car was properly based upon a search incident to his arrest for possessing marijuana. We affirm the judgment and orders of the trial court.

¶2 The facts are as follows: A city of Kenosha police officer observed a vehicle speeding and travelling directly through a yield sign. The officer activated his lights and siren to begin execution of a traffic stop. After the driver of the vehicle pulled over, the officer put on his squad car's spotlights and take-down lights. Two occupants were in the vehicle. While approaching the vehicle, the officer could "see a lot of furtive movements with the hands moving around inside pockets. They had jackets on. So you could see the hands going into the pockets, out of the pockets and that's when I went up to the vehicle itself." The officer approached the vehicle and asked the driver if he had his license on him. The driver, later identified as Cvorovic, said that he had a license but did not have it with him. Cvorovic was then asked to step out of the vehicle.

¶3 Upon exiting the vehicle, Cvorovic "acted kind of nervous, kept trying to put his hands in his pockets." The officer said, "Take your hands out of your pockets." As Cvorovic and the officer walked toward the squad car, Cvorovic again put his hands in his pockets. And again the officer told Cvorovic, "Take your hands out of your pockets; place them on my squad car."

¶4 The officer was concerned for his own safety. He told Cvorovic that he was going to pat him down for weapons for his own safety, since Cvorovic was reaching into his pockets. The officer performed the pat-down and found a green leafy substance in Cvorovic's pocket. The officer then placed Cvorovic under arrest for possessing marijuana, handcuffed him and placed him in the back seat of the squad car. The officer ordered the other occupant of Cvorovic's vehicle to step out of the car and then the officer searched the vehicle. He found, wedged between the two front seats, two hard rock-like items wrapped in clear plastic, which he thought to be crack cocaine. A criminal complaint charged Cvorovic with the two misdemeanor counts of possessing marijuana and possessing cocaine.

¶5 Cvorovic pled not guilty and moved to suppress the evidence relating to both the marijuana and the cocaine. After an evidentiary hearing, Cvorovic's position was that there were no facts from which a reasonable police officer would believe a weapons frisk was necessary. The trial court disagreed and found that the combination of the occupants' furtive movements, Cvorovic's repeated actions in putting his hands in his pockets, the time of night, the fact that the officer was by himself on the road in a position where he could be hurt and Cvorovic's failure to have a driver's license on him provided reasonable justification that a frisk had to be conducted for the officer's own protection. Cvorovic subsequently brought a motion for reconsideration, observing that Wisconsin law precludes reaching into a suspect's pockets during a frisk for weapons unless the officer feels an object that could be used as a weapon. Cvorovic argued that there was no evidence produced by the State supporting the view that the plastic bag of marijuana felt like a weapon from outside the pocket. The trial court denied the motion for reconsideration. As part of its decision, the trial court observed that the officer never testified that he did not feel anything

during the frisk. From the orders denying both the motion and the motion to reconsider and from the judgment of conviction that followed, Cvorovic then appealed to this court.

¶6 We will first discuss whether, from an objective standpoint, the facts available to the officer at the moment of the seizure would warrant a person of reasonable caution to believe that a weapons frisk was necessary. ***State v. Mohr***, 2000 WI App 111, ¶13, 235 Wis. 2d 220, ___N.W.2d ___. Cvorovic claims that the facts in his case are similar to the facts in ***Mohr***, where this court reversed a trial court's denial of a motion to suppress. The facts in ***Mohr***, found at ¶¶ 2-8, are as follows: A vehicle was observed to be violating a traffic regulation and was stopped. The officer noticed four passengers as he approached the car, one of whom was Mohr. The officer noticed an odor of intoxicants on the driver's breath and ordered the driver to perform sobriety tests and take a preliminary breath test. The tests resulted in a conclusion by the officer that the driver was not intoxicated. Yet, the officer asked for permission to search the vehicle. The driver granted permission. The officer asked Mohr to exit the vehicle, for the officer's safety. He told Mohr to sit in the squad car, but Mohr refused. Mohr said he was going to go home, which was only two blocks away, but was prevented from doing so by the officers. Mohr put his hands inside his pockets and became very resistive. For officer safety reasons, Mohr was told to remove his hands from his pockets, but he refused to do so. He was asked again to take his hands out of his pockets, but refused. About four or five minutes after exiting, Mohr was subjected to a frisk. Mohr tried to guard his left jacket pocket. The officer felt what appeared to be a large plastic baggie with soft material inside it in the jacket pocket. Thinking that it could be contraband, the officer removed it. The baggie contained marijuana and Mohr was placed under arrest for possessing marijuana.

¶7 We held that the frisk was unreasonable because the officer could not have objectively thought that Mohr was dangerous. ***Id.*** at ¶15. We acknowledged that the officer had justified the search on the basis that Mohr had refused to take his hands out of his pockets, but we weighed that against the following things: First, the frisk occurred about twenty-five minutes after the initial stop, nothing out of the ordinary had occurred during those twenty-five minutes. ***Id***. Second, we observed that the officer could hardly be concerned with his safety when he let Mohr sit in the vehicle for ten minutes after the stop and ignored Mohr for fifteen minutes more following that. ***Id.*** at ¶16. Third, back-up units were on the scene, which further obviated the need to frisk Mohr. ***Id***. In sum, we concluded that the officer's submission that he was concerned for his safety was belied by the facts.

¶8 We disagree with Cvorovic that ***Mohr*** is similar in its facts to this case. The only real similarity is that Cvorovic put his hands in his pockets, as did Mohr, and put them back in his pockets even after being told not to put them there. But the main theme in ***Mohr*** was the time differential between the stop and the frisk. We could not understand how an officer, who thought a person was not a threat for the first twenty-five minutes, could suddenly perceive the threat. This was especially so when Mohr was not the reason for the stop and was not under suspicion of having committed any crime. Here, Cvorovic was the driver. He committed a traffic violation. He was the object of the stop, unlike Mohr. The officer saw furtive movements by him and his passenger right away upon approaching the vehicle. When Cvorovic got out of the car, he was nervous and put his hands in his pockets. It was at night and the officer was alone. All of these events distinguish this case from ***Mohr***. The trial court's decision that there was reasonable justification to search for weapons will not be disturbed.

¶9 Now we get to the question of whether the search of the pocket exceeded the scope of a ***Terry***[2] frisk. Cvorovic leans on ***State v. Swanson***, 164 Wis. 2d 437, 454, 475 N.W.2d 148 (1991), for his supporting material. There, our supreme court held that "[t]he ***Terry*** doctrine precludes reaching into a suspect's pockets during a frisk unless the officer feels an object that could be used as a weapon." ***Id***. Cvorovic observes that the officer did not testify concerning what he did or did not feel on the outside of the pockets. All the officer said was that he conducted a pat-down and a green leafy substance was found in the jacket pocket.

¶10 Cvorovic does not say so in his brief, but we presume that he is of the opinion that unless the State can show how the sense of touch made the officer believe that there might be a weapon in the pocket, the State's burden of proving that the search met constitutional standards has not been attained.

¶11 If that is Cvorovic's opinion, he is wrong. Although the State has the ultimate burden of proof on suppression issues, the defendant has the burden of production and must produce some evidence that makes a prima facie showing that the State violated one of his or her rights. ***State v. Jackson***, 229 Wis. 2d 328, 336, 600 N.W.2d 39 (Ct. App. 1999). The ***Jackson*** court cited a number of cases in support of its holding and it is worthwhile to quote from two of them. In ***Rakas v. Illinois***, 439 U.S. 128, 130 n.1 (1978), the United States Supreme Court wrote: "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." And in ***United States v. de la Fuente***, 548 F.2d 528, 534 (5th Cir. 1977), the court held that the defendant has the initial burden "of producing some evidence on

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

specific factual allegations sufficient to make a prima facie showing of illegality." Once the defendant makes the prima facie showing, the ultimate burden of persuasion shifts to the government. ***Id***. at 533.

¶12 Here, Cvorovic never asked the officer whether he felt anything on the outside of the jacket pocket before placing his hand inside the pocket to search it. In short, he never put the claim in issue. That was his burden. Had it been put in issue and had the testimony supported Cvorovic's primary contention, the State would have carried the burden of proof on that issue. But the issue never materialized until the reconsideration motion. By then it was too late. The trial court reached virtually the same conclusion even without having the benefit of the case law before it. We quote the significant portions of the trial court's decision:

> First of all, we could not take more testimony. The hearing is over, and everybody has rested in regard to the hearing.… [Cvorovic] refused to take his hands out of his pocket, that [the officer] eventually … because of concern for his own safety, pat him down and reach into his pockets and found the marijuana. [The officer] never at any time said he didn't feel anything. He said he patted him down but reached into his pocket. The question was never asked ….

We conclude that the trial court was saying virtually the same thing that the ***Jackson***, ***Rakas*** and ***de la Fuente*** courts were saying. Cvorovic had the initial burden of putting the facts relating to a ***Swanson*** issue before the court. The officer was never asked. Since Cvorovic failed his burden of production, we reject his claim.

¶13 Because the arrest for possessing marijuana resulted from a valid frisk, the search of the automobile was incident to a valid arrest. Thus, evidence of the cocaine found in the vehicle was properly admitted into evidence.

By the Court.—Judgment and orders affirmed.

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