COURT OF APPEALS DECISION DATED AND FILED

August 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2797-CR

Cir. Ct. No. 01 CM 1366

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK E. HOPKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed in part; reversed in part*.

¶1 FINE, J. Derrick E. Hopkins appeals from a judgment of conviction entered on his pleas of guilty to unlawfully possessing tetrahydrocannabinols, *see* WIS. STAT. § 961.41(3g)(e), and to unlawfully carrying a concealed weapon, *see* WIS. STAT. § 941.23. He claims that WIS. CONST. art. I, § 25 "effectively repealed" § 941.23. (Uppercasing omitted.) He also contends that the trial court erroneously denied his motion to suppress the gun and marijuana. We affirm his

conviction for carrying a concealed weapon but reverse his possession-of-marijuana conviction.[1]

I.

¶2 The facts underlying the legal issues presented by this appeal are undisputed. In the middle of a February afternoon in 2001, Milwaukee police officers responded to a complaint that shots were fired from a car. The officers saw a parked car that they believed fit the description they were given. Three men, including Hopkins, were in the car. The officers saw what the trial court described as "furtive movements" by the men in the car once they "realized the officers were behind them." The officers approached the car, and could smell the odor of burning marijuana coming from it. With guns drawn, the officers asked if anyone in the car had "'any guns or drugs.'" Hopkins replied that he had a gun.

¶3 One of the officers took Hopkins from the car, handcuffed him, and removed the gun from Hopkins's pocket. Later, another officer asked the handcuffed Hopkins, who was then sitting in a police squad car, whether he had any drugs. Hopkins replied that he had marijuana in one of his pockets. None of the officers advised Hopkins of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), before asking any of these questions and before taking the gun and marijuana from Hopkins.

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[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. WIS. STAT. § 971.31(10).

II.

¶4 In reviewing an order suppressing or refusing to suppress evidence, we uphold a trial court's findings of historical fact unless they are clearly erroneous; however, we review *de novo* a trial court's conclusion whether a stop and search comported with the Fourth Amendment. ***State v. Harris***, 206 Wis. 2d 243, 249–250, 557 N.W.2d 245, 248 (1996). Additionally, whether a statute passes constitutional muster is also an issue of law. ***State v. Cole***, 2003 WI 112, ¶10. As noted, there are no disputed material facts here. Thus, this appeal presents only issues of law.

A. *Carrying a Concealed Weapon.*

¶5 WISCONSIN CONST. art. I, § 25 declares: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." As we have seen, Hopkins argues that this provision, adopted in 1998, ***Cole***, 2003 WI 112, ¶9, effectively repealed the statute that makes it unlawful to carry a concealed weapon. ***Cole*** held to the contrary, ***id.***, ¶¶26, 28–44, and Hopkins does not allege any of the factors that ***State v. Hamdan***, 2003 WI 113, recognizes might override the statute, and thus make lawful the carrying of a concealed weapon. *See* ***id.***, ¶¶61–75, 81–84, 86. Hopkins does, however, in a brief submitted at our request after both ***Cole*** and ***Hamdan*** were decided, seek a remand to the trial court for an evidentiary hearing to determine whether an "as applied" constitutional challenge to WIS. STAT. § 941.23 would be viable. We deny this request for two reasons. First, Hopkins did not challenge in the trial court the application of § 941.23 as applied to him. Rather, as we have noted and as Hopkins concedes in his supplemental brief, he contended that WIS. CONST. art. I, § 25 trumped § 941.23 in its entirety. By pleading guilty, Hopkins waived his right to challenge § 941.23 as applied to him. *See* ***Cole*** 2003 WI 112, ¶46.

¶6 Second, Hopkins has presented to us nothing as an offer of proof that raises even a colorable ***Hamdan*** argument. Hopkins alleges in his supplemental brief that: he was cooperative when arrested, "he was basically homeless," he was "living on money that he received from social security because of his mother's death," he "bought the [gun] about two months before the incident," and the prosecutor commented before the trial court that Hopkins "'stated he never fired the gun and he simply carried it for protection.'" Although "protection" is an element of the ***Hamdan*** "as applied" criteria, ***Hamdan***, 2003 WI 113, ¶¶64–75, 81–84, Hopkins, like Cole, does "not assert that he had the weapon[] [on his person] in response to any specific or imminent threat." ***Cole***, 2003 WI 112, ¶48. In light of the foregoing, we reject Hopkins's constitutional challenge to the enforcement against him of WIS. STAT. § 941.23, and his request for an evidentiary hearing.

B. *Suppression.*

¶7 The trial court denied Hopkins's motion to suppress the gun and the marijuana. Hopkins does not argue that the police did not have sufficient reasonable suspicion to approach the parked car. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830, 834 (1990) (investigatory stop is permissible if law enforcement officer reasonably suspects, considering the totality of the circumstances, that some type of criminal activity either is taking place or has occurred). He does argue, however, that the gun and the marijuana were discovered as a direct result of Hopkins's in-custody response to questions asked before he was told of his rights under ***Miranda***, and that, accordingly, the trial court should have suppressed both the gun and the marijuana as "fruit" of a "poisonous tree." *See* ***Wong Sun v. United States***, 371 U.S. 471, 484–488 (1963). Evidence that is discovered because of something that a defendant says in response to custodial

questioning in violation of ***Miranda*** must be suppressed. ***State v. Knapp***, 2003 WI 121, ¶¶48–79.

¶8 As a preliminary matter, the initial appellate briefs of both the State and Hopkins focused their arguments on the constitutionality of WIS. STAT. § 941.23, and largely ignored the subsidiary issues that, in light of ***Cole*** are now dispositive. Although we gave both the State and Hopkins the chance to file simultaneous supplemental briefs in the wake of ***Cole***, neither party addressed in their supplemental briefs any issue other than whether Hopkins's constitutional challenge to § 941.23 survives ***Cole***. We now turn to the evidence Hopkins argues the trial court should have suppressed.

1. *The Gun*

¶9 Whether evidence is the fruit of the poisonous tree of a ***Miranda*** violation turns on whether the police were obligated to give the ***Miranda*** warnings before asking the custodial questions at issue. Police need not, however, first give ***Miranda*** warnings to a person whom they reasonably suspect may have access to a weapon before they ask questions designed to locate the weapon and neutralize its danger. ***New York v. Quarles***, 467 U.S. 649, 654–660 (1984); *see also* ***State v. Kunkel***, 137 Wis. 2d 172, 186–188, 404 N.W.2d 69, 75–76 (Ct. App. 1987), *cert. denied*, 484 U.S. 929. Based on the record before us, the police were fully justified in asking whether any of the men in the car were armed.

¶10 Although the State does not argue the ***Quarles*** principle, we are not bound by the inadequacy of a party's appellate submission, especially when the public interest is implicated. *See* ***Markweise v. Peck Foods Corp.***, 205 Wis. 2d 208, 225, 556 N.W.2d 326, 333 (Ct. App. 1996). Given the dangers of weapons in the hands of persons who do not fall within the safe-harbor provisions recognized by

Hamdan, it is appropriate to affirm the trial court's denial of Hopkins's motion to suppress the gun based on ***Quarles***. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (trial court will be affirmed if it reaches right result for wrong reason).

2. *The Marijuana*

¶11 By the time the officer asked Hopkins whether he had any drugs, Hopkins was handcuffed and under police control. Unlike access to a gun, neither the police nor the public were at risk from Hopkins's potential access to the marijuana. Accordingly, under ***Knapp*** the marijuana should have been suppressed. Given the significantly different public interest in punishing those who possess small amounts of marijuana as opposed to those who unlawfully carry concealed weapons, we decline to invoke the rule recognized by ***Markweise*** and decide Hopkins's appeal of his conviction for possessing marijuana in the State's favor on a ground that the State has not argued; namely, that the marijuana would have been discovered irrespective of the officer's asking Hopkins whether he had any drugs before telling Hopkins about his rights under ***Miranda***. *See* ***Nix v. Williams***, 467 U.S. 431, 444 (1984); ***State v. Washington***, 120 Wis. 2d 654, 664–665, 358 N.W.2d 304, 309 (Ct. App. 1984) (inevitable discovery). The issue is thus waived. ***Reiman Assocs. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (matters not briefed are waived). Although ***Knapp*** left open for another day whether suppression would be required if the police "negligently," rather than intentionally, do not advise a custodial interviewee of his or her rights under ***Miranda***, ***Knapp***, 2003 WI 121, ¶79, we do not see, at least under the circumstances of this case, how, given the ubiquity of ***Miranda*** and the decision's age, a modern-day police officer would not know that a person from whom a gun was just taken and who was handcuffed and under police control in a squad car was in "custody" for ***Miranda***

purposes. *See* ***Knapp***, 2003 WI 121, ¶47 ("'[c]ustodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' ***Miranda***, 384 U.S. at 444.") (bracket in ***Knapp***).

III.

¶12 We affirm Hopkins's conviction for carrying a concealed weapon, but reverse his conviction for possessing marijuana.

By the Court.—Judgment affirmed in part and reversed in part.

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