

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 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. 02-1540-CR

Cir. Ct. No. 01-CF-1130

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JOSHUA O. KYLES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from an order granting Joshua Kyles's motion to suppress evidence gathered during a traffic stop. We conclude the suppression motion was properly granted and affirm.

¶2 Kyles was a passenger in a car that was pulled over for not having its headlights on after dark. The driver of the car consented to have the car searched. After observing Kyles standing around taking his hands in and out of his pockets during the traffic stop, one of the officers decided to do a protective pat down search for weapons and discovered marijuana in Kyles's pocket. A search incident to arrest revealed more marijuana in Kyles's jacket.

¶3 The parties agree that the legality of the initial protective search turns on whether the police had a reasonable basis to suspect that Kyles might be armed and dangerous, and that this court reviews that question de novo. *State v. McGill*, 2000 WI 38, ¶¶17 and 21, 234 Wis. 2d 560, 609 N.W.2d 795. The State argues that police did have reasonable suspicion under *McGill*, while Kyles argues that they did not, citing *State v. Mohr*, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186.

¶4 In *McGill*, the Wisconsin Supreme Court determined that officers reasonably conducted a protective search on a person who drove his car around barricades onto a closed road, did not pull over when police activated their lights, attempted to walk away from his vehicle to avoid the police, appeared unusually nervous and smelled of drugs and alcohol. *McGill*, 2000 WI 38 at ¶¶27-33. The court also noted that it was dark out and the officer conducting the stop was alone. In *Mohr*, this court determined that officers lacked reasonable suspicion to believe that a passenger in a car that was pulled over for traffic violations was armed and dangerous merely because he appeared nervous and refused to take his hands out of his pockets after the driver of the car had consented to have the car searched. *Mohr*, 2000 WI App 111 at ¶15. We noted that there were backup officers present, the passengers were allowed to sit in the car while field sobriety tests

were performed on the driver, and that the frisk was not performed until twenty-five minutes after the initial stop. *Id.* at ¶16.

¶5 We agree with Kyles that *Mohr* and *McGill* are factually distinguishable and that the facts of this case are more similar to *Mohr* than *McGill*. Like *Mohr*, Kyles was a passenger, rather than the driver of a car pulled over for a routine traffic stop, and the only stated basis for the protective search was that Kyles appeared nervous and had his hands in his pockets. Also, as in *Mohr*, there were backup officers present at the scene, and there was better lighting than was present in *McGill*. We conclude there was no reasonable objective basis to believe that Kyles was armed and dangerous, and the protective search was invalid. Because the initial protective search was improper, there was no basis for the arrest, and the subsequent search was also invalid. The trial court properly excluded the evidence from both searches.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

