

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 2007

David R. Schanker
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. 2006AP1883-CR

Cir. Ct. No. 2005CF2808

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNIE CLAY MCGHEE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Johnnie McGhee, Jr., appeals the circuit court's judgment of conviction and order contained therein denying his motion to suppress evidence. The issue is whether the police had a reasonable suspicion to stop McGhee under *Terry v. Ohio*, 392 U.S. 1 (1968). We affirm.

¶2 The Fourth Amendment protects against unreasonable searches and seizures by the government. *See State v. Young*, 2004 WI App 227, ¶13, 277 Wis. 2d 715, 690 N.W.2d 866. “A seizure occurs ‘when an officer, by means of physical force or a show of authority, restrains a person’s liberty.’” *Id.*, ¶15 (citation omitted). To determine whether a search or seizure is unreasonable, we look at whether the interference with an individual’s liberty was justified and reasonably related in scope to the circumstances that justified the interference in the first place. *Terry*, 392 U.S. at 19-20. We give deference to the circuit court’s findings of evidentiary or historical fact, but whether the governmental intrusion was reasonable is a question of law that we review independently. *State v. Pallone*, 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568.

¶3 The State first argues that a seizure did not occur when the police initially questioned McGhee. We disagree. After pulling over and exiting the police car, Police Officer Luke Chang directed McGhee, albeit in a friendly way, to come over and talk to him. McGhee testified that he felt obligated to comply. That is the moment at which the seizure occurred because McGhee was not free to ignore the officers and leave. *See Young*, 2004 WI App 227, ¶15 (a seizure occurs when a police officer, by show of authority, restrains a person’s liberty).

¶4 McGhee contends that the officers lacked reasonable suspicion to stop him. Officer Luke Chang testified that he and Detective Daniel Dittberner were finishing a traffic stop when they observed McGhee crossing the street.¹

¹ The circuit court did not make specific findings of fact pertaining to the police officers’ testimony, but its decision makes clear that it accepted the testimony of the police officers and their interpretation of what they saw. *See State v. Pallone*, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568 (“Even if the circuit court does not make an explicit factual finding, we assume that the court made the finding in a manner that supports its final decision.”).

McGhee looked over his left shoulder at them when he was in the middle of the street. Officer Chang testified that as McGhee was looking toward them, his right hand tapped his right pant pocket. He then continued walking, but kept his right side away from the officers. Officer Chang testified that, based on his training and experience, McGhee's actions were "the typical actions of an armed subject." Chang also testified that "statistically speaking, that particular area was known for high crime, more specifically, gun related crimes." Detective Dittberner testified that he noticed McGhee walking across the street, that McGhee looked up and immediately angled his body away from the officers while putting his right hand on his right pant pocket. He further testified that, based on his training and experience, McGhee's actions were consistent with a person that possibly has a weapon.

¶5 While this case presents a close call, we conclude that the officers' observations were sufficient to justify the stop. After seeing the police, McGhee turned his body in an unusual way, tapping his pocket as if to check for something. He then continued to walk, keeping his body turned at an angle that obscured the officers' view of his right side. The officers knew from training and experience that this behavior was consistent with carrying a concealed weapon and they knew that they were in a high crime area. We conclude that these circumstances were sufficient to justify the stop.

¶6 The circuit court discussed in its decision the fact that the situation escalated rapidly after the police asked McGhee to stop, that McGhee became nervous and the officers drew weapons because they thought McGhee might be armed and that he might flee. We reiterate that a court must determine whether a search or seizure is reasonable based on the circumstances that occur up to the

point at which the stop (seizure) is made, not based on circumstances that develop after the stop has been made. *See Terry*, 392 U.S. at 21-22.

By the Court.—Judgment affirmed.

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

