COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1565-FT **Cir. Ct. No. 2008JV247**

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

IN THE INTEREST OF RODNEY L., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RODNEY L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Judgment reversed and cause remanded.*

¶1 BRUNNER, J.[1] Rodney L. appeals a judgment adjudicating him delinquent resulting from his guilty plea to possession of a controlled substance

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2), and is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

with intent to deliver at or near a park under WIS. STAT. § 961.49(1m)(b)1. Although we conclude that law enforcement's temporary detention and protective frisk of Rodney were supported by reasonable suspicion, we hold that a second search following the initial protective frisk was unlawful. We therefore reverse the dispositional order and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 In the early evening of July 30, 2008, David Swanson, an on-duty police officer in Green Bay, was monitoring a park near a middle school for signs of drug and gang activity. He was positioned near a window inside a community policing center, and could view the center's parking lot and the park across the street from this vantage point. According to Swanson, his assignment was the result of "numerous complaints of gang activity, including fights, assaults, display of gang colors, [and] gang signing, occurring in the parking lot." The police department also received complaints about drug transactions occurring in the lot.

¶3 At about 6:15 p.m., Swanson observed a car pull into the parking lot and watched several individuals exit the vehicle and begin gang signing to one another and to others in the parking lot. Swanson thought this activity suspicious and watched a man later identified as Hansel Canady approach the vehicle. Canady also made gang signs, used a cell phone, and then walked out of Swanson's line of sight to the west.

¶4 After about a minute, Swanson observed Canady return to the car from the west and make an exchange with the driver. The driver handed Canady some currency, which Canady began "thumbing through." Canady returned some

of the currency and also handed the driver a substance Swanson could not identify. Canady left the car and walked away to the west and out of Swanson's sight.

¶5 Thirty to sixty seconds later, Swanson observed Canady again, who appeared from the west with a companion later identified as Rodney L. Swanson requested assistance based on his suspicion that the transaction he witnessed involved narcotics, and described the pair for the responding officers as he continued to track their movement from the window. Swanson testified at the suppression hearing that he requested responding officers to detain both individuals because "generally drug dealers travel in pairs or more, and one [person] hold[s] the drugs that [the other person is] about to sell."

¶6 Officer Brian Jordan was one of the officers who intercepted the pair. Based on Swanson's description, Jordan identified Canady and Rodney while driving in his marked squad car and approached them. The pair talked next to a picnic table near some middle-school aged children, but stopped and stared at the officers as they approached. As Jordan parked his car, Rodney "quickly put his hands in his front pocket of his black sweater, turned away from [Canady], put his head down … and tried walking away from [Canady and] … past my squad." Rodney complied when Jordan ordered him to stop and put his hands behind his back.

¶7 Jordan questioned Rodney whether he had any contraband on him, to which Rodney replied in the negative. Another officer questioned Canady while Jordan, concerned that a possible drug deal could involve weapons or firearms, frisked Rodney. Initially, Jordan ran the blade of his hand down Rodney's clothing, and felt what he described as "lumps" that "sound[ed] like plastic cellophane baggies in his right front shorts pocket." Although Jordan knew the

objects were not weapons, he testified that they did feel like a narcotic substance. Jordan then "brushed [Rodney's pocket] again to confirm what I felt, and I handcuffed him, and then I reached into his front pocket." Jordan recovered four individually wrapped, small, clear, plastic baggies containing a greenish-brown, leafy substance that he identified as marijuana.

¶8 The State filed a delinquency petition alleging a violation of WIS. STAT. § 961.49(1m)(b)1., possession of a controlled substance with intent to deliver at or near a park. Rodney filed a motion to suppress the evidence retrieved by law enforcement. The court denied the motion and Rodney later admitted to the charge and was found delinquent. The court ordered one year of supervision.

DISCUSSION

¶9 Rodney argues that the circuit court erroneously denied his suppression motion for three reasons. First, he asserts that he was impermissibly detained solely on the basis of his association with another individual suspected of a drug offense. Second, he argues the protective search was unlawful because the responding officer lacked reasonable suspicion that Rodney possessed weaponry. Finally, he claims that a frisk for items of potential evidentiary value following a protective search revealing no weapons violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

¶10 Rodney's appeal raises constitutional issues involving the propriety of a search and seizure. Whether an investigative detention and subsequent pat-down search were justified by reasonable suspicion is a question of constitutional fact. ***State v. Kelsey C.R.***, 2001 WI 54, ¶12, 243 Wis. 2d 422, 626 N.W.2d 777. We apply a two-step standard of review under these circumstances, upholding the circuit court's findings of historical fact unless they are clearly erroneous but

reviewing the circuit court's application of constitutional principles to those facts de novo. ***Id.*** Different standards of reasonable suspicion justify a temporary detention and a protective search. *Compare* ***Kelsey C.R.***, 243 Wis. 2d 422, ¶38 (temporary detention justified if police had reasonable suspicion the detainee had committed, was committing, or was about to commit a crime), *and* WIS. STAT. § 968.24, *with* ***State v. Bridges***, 2009 WI App 66, ¶10, 767 N.W.2d 593 (protective search is reasonable if temporary detention is reasonable and the officer reasonably believes the detainee might be armed and dangerous), *and* WIS. STAT. § 968.25.

¶11 We conclude Jordan's conduct up to the point of the second frisk was lawful. The investigative detention was valid and supported by Jordan's reasonable suspicion that Rodney was involved in a drug transaction. Jordan testified at the suppression hearing that drug dealers often divide the drug- and money-carrying duties between two individuals. Drug transactions in the park generated frequent complaints, and no more than sixty seconds elapsed between the end of Canady's transaction with the driver and the time he reappeared walking and talking with Rodney. The protective search was also justified at its inception by Jordan's reasonable suspicion that Rodney was armed. Unusual nervousness, which includes an "otherwise inexplicable sudden movement toward a pocket … where a weapon could be concealed," is a significant factor in assessing reasonable suspicion. ***State v. Sumner***, 2008 WI 94, ¶39 n.20, 312 Wis. 2d 292, 752 N.W.2d 783 (quoting 4 WAYNE R. LAFAVE, *Search and Seizure* § 9.6(a), at 628-30 (4th ed. 2004); *see also* ***State v. Kyles***, 2004 WI 15, ¶¶41, 54, 269 Wis. 2d 1, 675 N.W.2d 449 ("[o]fficers have a legitimate, objective concern for their own safety when an individual reaches into his pockets"). Police anxiety about armed suspects is compounded where the detention occurs, as here, in a

location known for gang violence and assaults. *See* ***Kyles***, 269 Wis. 2d 1, ¶62 (location of the search, and the location's reputation, are relevant factors in assessing totality of circumstances). Under the totality of the circumstances, Rodney's detention and protective frisk were supported by reasonable suspicion.[2]

¶12 The scope of a weapons search, however, reflects its limited purpose: protection of the police and others nearby. ***State v. Allen***, 226 Wis. 2d 66, 76, 593 N.W.2d 504 (Ct. App. 1999); *see also* ***Minnesota v. Dickerson***, 508 U.S. 366, 378 (1993). The protective frisk "must be confined in scope to an intrusion reasonably designed to discover instruments which could be used to assault the officer." ***Allen***, 226 Wis. 2d at 76. When a lawful search for weapons results in the seizure of a different item, we are "sensitive to the danger … that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." ***Dickerson***, 508 U.S. at 378 (quoting ***Texas v. Brown***, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in the judgment)). Where a protective search extends beyond what is necessary to determine if the suspect is armed, the search is no longer valid under ***Terry v. Ohio***, 392 U.S. 1 (1968), and its fruits must be suppressed. ***Dickerson***, 508 U.S. at 373 (citing ***Sibron v. New York***, 392 U.S. 40, 65-66 (1968)).

[2] We reject Rodney's argument that the protective search was made solely on the assumption that all drug dealers are armed. We further reject Rodney's reliance on ***Richards v. Wisconsin***, 520 U.S. 385 (1997), for the proposition that protective searches made on that assumption are unlawful. In ***Richards***, the Supreme Court considered the propriety of our supreme court's conclusion that police officers are never required to knock and announce their presence when executing a search warrant in a drug investigation. While the Court did find suspect the notion that all drug dealers proceed armed, it did so in the context of a home intrusion. Government intrusions into personal privacy are much more pronounced where agents sweep into one's home during the night without announcement to execute a warrant. By contrast, a protective frisk over a suspect's outer clothes in a public park presents a minimal privacy invasion.

¶13 In ***Dickerson***, the Supreme Court held that law enforcement officers may seize contraband found during protective searches for weapons. ***Dickerson***, 508 U.S. at 373. One important qualification accompanied the Court's expansion of the plain-view doctrine to encompass such "plain-touch" seizures: law enforcement must remain within the boundaries set in ***Terry*** for protective searches. ***Dickerson***, 508 U.S. at 372-74. The Court approved the Minnesota Supreme Court's conclusion that the officer conducting the protective frisk overstepped these boundaries by "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket" even though he knew it contained no weapon. ***Id.*** at 378 (quotation omitted). Professor LaFave states the rule of ***Dickerson*** more bluntly: "If during a lawful pat-down an officer feels an object which obviously is not a weapon, further 'patting' of it is not permissible." 4 LAFAVE, *supra*, § 9.6(b), at 660.

¶14 At the time of the second frisk, Jordan no longer entertained a reasonable suspicion that Rodney was armed or dangerous. Jordan's search was lawful only to the extent that it was necessary for his or others' protection. Jordan testified the objects he felt during the initial pat down were neither hard nor rigid, and he knew the objects were not weapons. Once Jordan determined the objects were not weapons, his justification for further searching dissipated and the second pat down was therefore an unauthorized evidentiary search. *See* ***Dickerson***, 508 U.S. at 378. Where police lack probable cause to believe an object in plain view is contraband without subjecting the object to a further search, its incriminating character is not readily apparent and the plain-view doctrine cannot justify its seizure. ***Id.*** at 375-76. No probable cause to seize the objects existed until after a second, confirmatory search.

¶15 The State minimizes the importance of the second frisk, arguing that we should apply ***Dickerson***'s "plain touch" exception because the objects' evidentiary nature was immediately apparent to Jordan. The State argues that Jordan displayed "no lack of confidence" in what he felt. We disagree. The second frisk was wholly unnecessary if Jordan was certain the items he felt during the first pat down were contraband. Jordan's action is sufficient evidence of his uncertainty. The law demands that the illicit nature of the objects be "immediately apparent," and here it was obviously not. *See* ***Dickerson***, 508 U.S. at 375. We therefore reverse the dispositional order and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

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