COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1626-CR **Cir. Ct. No. 2013CF1003**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRINE JAVOR DONALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS and TIMOTHY M. WITKOWIAK, Judges. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Tyrine Javor Donald appeals a conviction for possessing heroin with intent to deliver. Following his guilty plea and conviction, Donald moved to withdraw his plea on the grounds that he received ineffective assistance of counsel.[1] He argued that he was prejudiced by counsel's failure to challenge the legality and scope of the police frisk that led to the evidence. Following a traffic stop, an officer had frisked Donald, and during that frisk, the officer felt an object concealed in Donald's pants. A strip search conducted at the police station revealed that the object was a bag of heroin. The circuit court denied Donald's motion without a hearing. We now affirm.

BACKGROUND

¶2 While waiting at a stop light, officers observed a vehicle drive northbound in the southbound lane of 35th Street in Milwaukee; they followed the vehicle into an alley and conducted a traffic stop. The officer who wrote the police report of the incident, Joseph Esqueda, included the following details:

- Esqueda approached the vehicle with his partner; Esqueda walked up to the passenger side. The other officer ordered the driver to roll down the windows, and the driver complied.

- As Esqueda approached, he saw Donald, who was in the front passenger seat, turn away from the passenger door and reach over the center console toward the back seat. While Donald was facing away from the door and watching the other officer talk to the driver, Esqueda saw Donald put his

[1] The Honorable Jonathan D. Watts presided over Donald's plea hearing and sentencing hearing. The Honorable Timothy M. Witkowski issued the order denying Donald's motion for postconviction relief.

right hand down his pants, "making small pushing motions downward as if he was concealing or retrieving an item."

- When Esqueda addressed the passenger through the open window, Donald "quickly removed his right hand from his pants[.]"

- As Esqueda proceeded to obtain identification from Donald, he noted several things: Donald's eyes were wide, he stuttered, his breathing was shallow and fast, and his hand was shaking.

- Esqueda took Donald's identification and then noticed Donald "grab the inner side of his right thigh near his groin" in the same spot where he had previously had his right hand in his pants.

- Esqueda considered the movement a possible "security check"—a reflexive movement often made by people who are carrying an unsecured firearm.

¶3 Esqueda then ordered Donald out of the vehicle and conducted a pat-down for weapons. Esqueda described the pat-down as done "with an open bladed hand[.]" In the course of the pat-down, Esqueda "felt a golf ball-sized object, which had a powdery and chunky consistency" in Donald's groin area and felt the object "crinkle" like a plastic bag. In response to questions, Donald said first that he had "nothing down his pants" and then that it was "just some bag"—a slang reference to a small quantity of marijuana. Esqueda noted in his report that Donald's pants were completely tucked into the tops of his boots.

¶4 Esqueda placed Donald in handcuffs and took him to the District 7 police station. Esqueda obtained authorization to perform a strip search. During the strip search, a bag of what was later confirmed to be heroin fell out of the bottom of Donald's pantleg. Esqueda also found five brand new straight razors in

Donald's left front pants pocket. Donald was subsequently charged. At the final pretrial hearing, he informed the court that he wished to enter guilty pleas pursuant to a plea agreement. He was convicted of possession with intent to deliver a controlled substance (heroin, three to ten grams) and felony bail jumping.[2] Following conviction and sentencing, Donald brought a motion seeking to withdraw his pleas on the grounds that he had received ineffective assistance of counsel, due to counsel's failure to move to suppress the drug evidence on the grounds of an unlawful frisk. The circuit court denied the motion. Donald now appeals. He argues that he is entitled to a hearing on his claim that trial counsel was ineffective for failing to move to suppress the evidence of the heroin package. In order to prevail on the motion for a hearing, he must show that such a motion would have been successful. Therefore, we begin with an analysis of whether such a motion, if brought, would have been successful. We conclude that it would not have been.

DISCUSSION

I. Standard of review and relevant legal principles.

¶5 "To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice, that is, that there are serious questions affecting the fundamental integrity of the plea." ***State v. Dillard***, 2014 WI 123 ¶83, 358 Wis. 2d 543, 859 N.W.2d 44 (footnote and quotation marks omitted). "One way

[2] The charges to which Donald pled were in two separate cases, 2013CF1003 and 2014CF1766. A felony bail jumping charge from 2014CF1108 and a misdemeanor obstructing charge from 2014CF1766 were dismissed and read in.

to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." ***Id.***, ¶84. To prove a claim of ineffective assistance of counsel, a defendant must show that his attorney performed deficiently, resulting in actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant who claims trial counsel rendered ineffective assistance of counsel by failing to bring a suppression motion must show that the motion would have succeeded. ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). Trial counsel is not "ineffective for failing to make meritless arguments." ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245.

¶6 Only if the postconviction motion alleges with factual specificity both deficient performance and actual prejudice is an evidentiary hearing warranted. ***State v. Balliette***, 2011 WI 79, ¶¶20-21, 336 Wis. 2d 358, 805 N.W.2d 334. Where withdrawal of a plea is sought, the defendant must show that but for counsel's alleged deficiencies, he or she would not have pled guilty and would have instead proceeded to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶7 In the course of a traffic stop, an officer may "order passengers to get out of the car pending completion" of a lawful traffic stop. ***Maryland v. Wilson***, 519 U.S. 408, 410, 415 (1997). An officer can perform a frisk of a passenger so long as there is "reasonable suspicion that the person subjected to the frisk is armed and dangerous." ***Arizona v. Johnson***, 555 U.S. 323, 327 (2009). The standard is "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that" the person presented a danger to others. ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). This is a totality of the circumstances determination. ***State v. McGill***, 2000 WI 38, ¶23, 234 Wis. 2d 560, 609 N.W.2d 795.

¶8 A ***Terry*** frisk "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby[.]" ***Terry***, 392 U.S. at 26. However, in holding that a pat-down was in fact a search (before proceeding to the question of the circumstances under which it would be a *reasonable* search), the ***Terry*** court quoted a 1954 text on police procedure to describe what kind of physical contact a pat-down for weapons entailed:

> Consider the following apt description: "(T)he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L.C. & P.S. 481 (1954).

Terry, 392 U.S. at 17 n.13.

¶9 "[A]n officer is entitled not just to a pat-down but to an *effective* patdown in which he or she can reasonably ascertain whether the subject of the pat-down has a weapon[.]" ***State v. Triplett***, 2005 WI App 255, ¶12, 288 Wis. 2d 515, 707 N.W.2d 881. A frisk has a limited purpose: to "determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." ***State v. Kyles***, 2004 WI 15, ¶9, 269 Wis. 2d 1, 675 N.W.2d 449. Although the frisk is one for weapons, an officer need not ignore contraband discovered during a ***Terry*** frisk. ***Minnesota v. Dickerson***, 508 U.S. 366, 374 (1993). "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy[,]" and warrantless seizure is justified because the situation is analogous to the "plain-view" doctrine. ***Id.*** at 375 (adopting what is known as the "plain-touch" doctrine). It is sufficient

if it is apparent "only that the object is incriminating in nature." ***State v. Applewhite***, 2008 WI App 138, ¶16, 314 Wis. 2d 179, 758 N.W.2d 181.

II. A motion to suppress the evidence would not have succeeded because reasonable suspicion supported the frisk, the officer did not exceed the scope of the pat-down frisk, and the arrest was based on probable cause.

A. Reasonable suspicion supported the frisk.

¶10 Donald challenges the frisk, arguing that the facts here do not support a reasonable suspicion that he was armed. He argues that he gave his identification, he was cooperative, that his nervousness was normal and not suspicious, *see* ***State v. Sumner***, 2008 WI 94, ¶38, 312 Wis. 2d 292, 752 N.W.2d 783 (holding that nervousness is typical during a traffic stop and ordinary nervousness alone is not enough to justify a weapons search), and that the type of furtive movements the officer observed Donald make are not sufficient to justify the frisk, *see* ***State v. Johnson***, 2007 WI 32, ¶¶34-35, 299 Wis. 2d 675, 729 N.W.2d 182 (holding that a single movement cannot justify a protective search). In ***Johnson***, the court concluded that a driver's leaning forward movement, without more, did not establish objectively reasonable suspicion of dangerousness, and the protective search was not justified. ***Id.***, ¶36.

¶11 Donald argues that the facts here are similar to those in ***Johnson***, and we should find, as the court did there, that there was no legal basis for a protective search and that the unlawfully obtained evidence must be suppressed. We do not agree that this case presents the same facts as ***Johnson***.

¶12 We first note that in ***Johnson*** the defendant was stopped for an emission violation and failure to signal. ***Id.***, ¶2. In this case, the traffic stop was initiated after the driver drove the wrong way against traffic and then didn't

immediately stop when police turned on the lights and siren. The nature of the initial encounter is part of the "totality of the circumstances" for a reasonable suspicion determination.

¶13 More importantly, the sole movement that served as the basis for the protective search in ***Johnson*** was when the driver had "lean[ed] forward," and officers saw the movement and interpreted the action as "consistent with an attempt to conceal contraband or weapons." ***Id.***, ¶3. That was not enough to constitute a basis for reasonable suspicion. Here, the police report indicated that an officer standing at the passenger door observed Donald with his right hand "down the front of his pants" past the wrist, reaching "towards his right thigh and groin area" and "making small pushing motions downward[.]" When he noticed the officer standing next to the door, Donald "quickly removed his right hand from his pants[.]" After Donald gave the officer his identification, the officer saw him "grab the inner side of his right thigh near his groin" where he had just appeared to place something. These unusual and repeated movements are distinguishable from the "leaning forward" movement that was found insufficient to support reasonable suspicion in ***Johnson***. And although a single movement cannot alone constitute reasonable suspicion, an "unexplained reaching movement or a furtive gesture … during a traffic stop *can be a factor* in causing an officer to have reasonable suspicion that a suspect is dangerous and has access to weapons." ***Sumner***, 312 Wis. 2d 292, ¶22 n.11 (emphasis added). *See also* ***State v. Morgan***, 197 Wis. 2d 200, 214-15, 539 N.W.2d 887 (1995) (nervousness a factor in reasonable suspicion determination).

¶14 Further, "unusual nervousness of a suspect may indicate wrongdoing[.]" ***Sumner***, 312 Wis. 2d 292, ¶38. And the officer here observed

exaggerated physical indications of nervousness: Donald's eyes were wide, he was breathing fast and shallow, he stuttered, and his hand was shaking.

¶15 After a stop of the vehicle for erratic driving, the officer watched the passenger make noticeable efforts to put something in his pants while the passenger thought he wasn't being observed, remove his hand quickly when he realized he was, respond with evident and unusual nervousness, and then touch the place where he had just put the item, as if to be sure of its location. On these facts, a reasonably prudent person "would be warranted in the belief" that people's safety was in danger. ***Terry***, 392 U.S. at 27.

B. The pat-down search of Donald's groin did not exceed the scope of a search for weapons.

¶16 Donald further argues that even if the search was supported by reasonable suspicion, it exceeded a lawful protective search because the officer "intrusively touched intimate areas of Mr. Donald's body where police could not reasonably expect to find a weapon." He cites to case law holding that "a proper investigative patdown 'involves only a search that is carefully limited to a pat-down of the outer clothing of a suspect[.]'" ***Triplett***, 288 Wis. 2d 515, ¶11. There is no dispute that the officer limited the search to Donald's outer clothing. And we reject Donald's argument that a protective search cannot reasonably include the groin area because it is not supported. As the State notes, the case establishing the constitutionality of such searches specifically recognized that the groin area was not off-limits in a weapons search when it was determining what standard would satisfy the Fourth Amendment's reasonableness requirement. *See* ***Terry***, 392 U.S. at 17 n.13.

C. Because the officer had "lawful right of access to the object," and the object's incriminating character was "immediately apparent," the arrest of Donald and seizure of heroin was lawful.

¶17 Donald argues in the alternative that the officer's statement in the report that when he touched the object in Donald's groin he "believed the object to be suspected drugs" is not enough to meet the standard under which police are allowed to seize evidence found during a frisk; he argues that this shows that the object's "incriminating character" was not "immediately apparent," as case law requires for a seizure. *See* ***Dickerson***, 508 U.S. at 375.

¶18 We note first that Fourth Amendment analysis requires an objective standard, not a subjective one. (For example, the ***Terry*** frisk standard is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger." ***Terry***, 392 U.S. at 27.) The words an officer uses to describe the discovery of the object are not dispositive.

¶19 Contraband discovered during a ***Terry*** frisk can be seized. ***Dickerson***, 508 U.S. at 375. Where a lawful pat-down leads police to notice that an object is hidden under clothing, the object can be seized if its "contour or mass makes its identity immediately apparent." ***Id.*** It is sufficient if it is apparent "only that the object is incriminating in nature." ***Applewhite***, 314 Wis. 2d 179, ¶16. On the facts of this case, which include the officer's direct observation of Donald stuffing something into his groin area under his pants, the discovery of a "golf ball-sized object" that "crinkle[d]" when touched is "incriminating in nature." The seizure of the heroin was consistent with the rules of ***Dickerson*** and ***Applewhite***.

III. Donald is not entitled to an evidentiary hearing.

¶20 Donald's postconviction motion for a hearing was premised on the assumption that a suppression motion would have been successful. Our conclusion that it would not have been is dispositive of the question and compels the conclusion that the motion was properly denied.

By the Court.—Judgment and order affirmed.

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