

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP2547-CR

Cir. Ct. No. 2006CF159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILL A. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. Bill A. Moore appeals from a judgment of conviction for battering a police officer and possession of marijuana, both as repeater

offenses. Following a hearing at which the circuit court denied his motion for suppression of evidence, Moore pled no contest to the charges. Moore contends that the circuit court erred when it held that the police had reasonable suspicion to stop him and were justified in requesting a weapons frisk. He argues that all evidence resulting from the encounter should have been suppressed. We disagree and affirm the judgment of conviction.

FACTS AND PROCEDURAL BACKGROUND

¶2 On March 22, 2006, at approximately 11:00 p.m., the City of Sheboygan Police Department received an anonymous tip that people in the basement of Fatty Arbuckle's Tavern were smoking marijuana. The tipster did not identify the individuals by race or gender, and did not say how recently the smoking took place. Officer Mike McCarthy responded with a fellow officer to investigate.

¶3 Upon arriving at Arbuckle's, McCarthy walked down the driveway on the east side of the bar, which leads to a lower parking lot and a back door. He peered through a window in the door and saw two people standing inside, about twenty or twenty-five feet from where he stood. McCarthy grabbed the door handle and attempted to open the door, but it was locked. When the door handle rattled, one individual, a white male later identified as the bar manager, David Orvis, turned and ran up the stairs. The other, a black male later identified as Moore, began walking backwards down a hallway.

¶4 McCarthy walked to the front of the bar and went in. Orvis stated that the lower portion of the tavern was open and he led the two officers downstairs. While at the bottom of the stairs, McCarthy saw Moore "walking out of the hallway talking on his cell phone." McCarthy asked Moore for

identification, and when doing so he noticed the odor of “unburnt fresh marijuana” on Moore. Moore gave McCarthy his identification and kept walking past. McCarthy then asked Moore to end his phone conversation and Moore complied. McCarthy told Moore that he was on the premises to investigate a complaint about people smoking marijuana in the basement. He asked Moore if he had marijuana on his person and Moore said no. McCarthy observed Moore standing with his hands down at his side and “acting very nervous.” He described Moore’s answers to “normal questions” as “real emphatic.” He also noticed that Moore’s right leg was shaking.

¶5 McCarthy asked Moore if he could search him. Moore responded, “I have a big problem with you searching me.” McCarthy asked if Moore had weapons on him and Moore responded that he did not. Moore then took a step back and “kind of pulled his jacket apart at the waist and told [McCarthy] he didn’t have any weapons on him.” McCarthy testified that he was concerned for his own safety because of the drug-related nature of the call, the dark basement, and Moore’s behavior during their encounter. McCarthy then told Moore that he was going to search him for weapons and instructed him to turn around. Moore turned but then ran for the stairs.

¶6 McCarthy rushed after Moore, who quickly tripped in the stairwell. McCarthy then fell onto Moore and attempted to secure him while Moore struggled. Both men tumbled back down the steps and into a pool table in the basement. The struggle continued out the back door before Moore was subdued.

¶7 Eventually McCarthy and another officer succeeded in securing Moore, placing him in handcuffs, and escorting him to a squad car. During the struggle, Moore’s jacket had come off. McCarthy, on a tip from another officer

that drugs were visible in the jacket, searched the jacket and discovered a bag of marijuana, together with two bags of cocaine. A search of Moore's person led to the discovery of over seven hundred dollars in cash.

¶8 The State charged Moore with battery of a peace officer, possession with intent to deliver cocaine, possession of marijuana, resisting an officer, obstructing an officer, and felony bail jumping.¹ Moore moved to suppress all evidence obtained from McCarthy's "illegal stop, detention, seizure, and frisk/search" of Moore. The court convened a hearing and made an oral ruling on the motion. It denied Moore's motion, reasoning that McCarthy confirmed the anonymous tip by looking through the basement window at the tavern. Further, the officers entered the upper level of the building, a public area, and were allowed to go downstairs. The court determined that McCarthy's actions were reasonable when he stopped Moore to ask for identification. It further determined that the smell of unburnt marijuana, the isolated nature of the setting, and the nervousness of Moore supported McCarthy's decision to search Moore.

¶9 Moore pled no contest to the charge of battery to a peace officer and to the charge of possessing marijuana. The remaining charges were dismissed.

¹ The court dismissed the cocaine charge because Moore was federally indicted on that particular charge.

DISCUSSION

¶10 Moore appeals, arguing that the circuit court should have granted his motion to suppress the evidence obtained following an unreasonable stop and search. We review a circuit court's ruling on a motion to suppress by employing a two-step analysis. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729, *cert. denied*, 127 S. Ct. 994 (2007). We accept the court's findings of fact unless they are clearly erroneous. *Id.* However, whether those facts meet the applicable constitutional standard is a question we review de novo. *Id.*

¶11 Moore first contends that the initial stop was unreasonable because it was based on no more than an uncorroborated anonymous tip. WISCONSIN STAT. § 968.24 (2005-06),² titled "Temporary questioning without arrest," represents the codification of the United States Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). *State v. Patton*, 2006 WI App 235, ¶9, 297 Wis. 2d 415, 724 N.W.2d 347. The statute authorizes a law enforcement officer to detain a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, or is about to commit, a crime. An investigative stop must be supported by reasonable suspicion, which is less than the probable cause required for arrest. *See State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305. An officer's suspicion, if based on specific, articulable facts and reasonable inferences from those facts, will justify a stop. *Id.* When determining if the standard of reasonable suspicion was met,

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

those facts known to the officer at the time of the stop must be taken together with any rational inferences and considered under the totality of the circumstances. *Id.*

¶12 Moore directs us to *Florida v. J.L.*, 529 U.S. 266, 270 (2000), where the Supreme Court held that an anonymous tip lacking even moderate indicia of reliability would not justify an investigative stop. In *J.L.*, as here, the tipster complained of criminal activity and gave a location where the activity was taking place. *J.L.*, 529 U.S. at 268. Further, the tipster failed to provide a basis for its knowledge or specific details about the suspects. *Id.* The State concedes that an anonymous tip alone is not sufficient to justify a stop, but argues that it can assist in the formulation of reasonable suspicion. See *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d. 729, 623 N.W.2d 516. When the tipster is anonymous, the officer must consider the reliability and content of the tip and must corroborate the information through independent investigation. *Id.*, ¶¶17, 22. The degree of corroboration necessary to justify a stop will vary with the particular case. *Patton*, 297 Wis. 2d 415, ¶10.

¶13 In *Patton*, we considered the development of reasonable suspicion after an anonymous tip was received. *Id.*, ¶11. There, where there was an anonymous tip and “an additional component, *separate and apart from the information provided by the tipster*,” we held that the investigatory stop was supported by reasonable suspicion. *Id.*, ¶22. The additional component in *Patton* was what we termed the “siren component.” *Id.* There, when the officer first observed the suspects at the location indicated by the tipster, he notified other officers and waited for their assistance. *Id.*, ¶23. The officer heard the siren of one of the responding police vehicles and, contemporaneously, he saw the suspects stop and look back in the direction of the siren. *Id.* The suspects then turned abruptly and entered a restaurant. *Id.* When the siren was turned off, the

suspects returned to the street and proceeded in the direction they were originally heading. *Id.* We concluded that the officer's observations, in conjunction with the information provided by the tipster, provided the requisite reasonable suspicion to justify the temporary detention of the suspects. *Id.*

¶14 Moore presents us with a somewhat similar situation. The anonymous tipster did not provide information we normally associate with indicia of reliability. McCarthy stated that the anonymous tipster did not say how many individuals were smoking marijuana and did not describe the individuals by race, facial features or other characteristics. The tipster did not say whether the individuals were male or female. McCarthy did not know whether the tipster based her information on personal observations, comments she had overheard from the individuals, or perhaps allegations made by others. Thus, when McCarthy went to Arbuckle's, he needed corroboration of the tip. *See Rutzinski*, 241 Wis. 2d 729, ¶¶17, 22.

¶15 Corroboration that criminal activity was afoot came when the two individuals in the basement of the bar reacted to the presence of an officer at the door. Orvis, the bar manager, ran up the stairs. Moore started backing down a hall, away from McCarthy. We have held in the past that an attempt to evade police immediately upon seeing them suggests a guilty mind and can trigger reasonable suspicion for an investigative stop. *State v. Amos*, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998) (evasion of the police alone may raise sufficient suspicion to justify an investigatory detention); *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) ("Flight at the sight of police is undeniably suspicious behavior."). An individual approached by the police without reasonable suspicion may ignore the police and go about their business,

but unprovoked flight from an officer justifies a temporary detention. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

¶16 McCarthy understood from the tipster that people were smoking marijuana in a basement room at Arbuckle's. McCarthy observed Orvis and Moore in the basement, and he saw both immediately retreat upon spotting him at the door. Although Moore's backing down the hallway may not conjure up an image of "flight," the record establishes that Moore reacted immediately when he noticed McCarthy's presence at the door and he backed into a dark hallway where McCarthy could no longer see him. We are satisfied that Moore attempted to evade McCarthy. These facts, together with the reasonable inference that evasive acts evince a guilty mind, justified McCarthy's decision to make an investigative stop.

¶17 Moore next argues that McCarthy's decision to frisk him for weapons was unreasonable. When we review a circuit court's holding on the legality of a search, we accept the court's findings of fact unless they are clearly erroneous, but whether those facts justify the search is a question of constitutional fact that we review de novo. *State v. Kyles*, 2004 WI 15, ¶¶6-7, 269 Wis. 2d 1, 675 N.W.2d 449. The Fourth Amendment protects citizens from unreasonable searches. "[A] police officer may conduct a frisk for weapons where a reasonably prudent [person] in the circumstances would be warranted in the belief that [the officer's] safety ... was in danger because the individual may be armed with a weapon and dangerous." *State v. Kolk*, 2006 WI App 261, ¶11, 298 Wis. 2d 99, 726 N.W.2d 337 (citation omitted).

¶18 We begin by looking at the sequence of events. McCarthy entered a dark basement where he had observed suspicious activity. He smelled the odor of

unburnt marijuana on Moore. He asked for identification from Moore and Moore complied. McCarthy then asked Moore if he had any weapons. Moore said no, and then reached for his jacket and pulled it slightly open. McCarthy then announced he was going to frisk Moore for weapons, and Moore said he “had a problem” with that. Before McCarthy was able to perform the frisk, Moore ran. A physical altercation ensued and Moore’s jacket came off in the fracas. After McCarthy had subdued Moore and placed him in the squad car, he searched the jacket. We read Moore to challenge McCarthy’s initial decision to frisk him for weapons, which triggered the degrading. We do not understand him to challenge McCarthy’s eventual search of his jacket after the brawl.³ Moore argues that all evidence following McCarthy’s attempt to frisk him for weapons should have been suppressed as fruits of an unlawful search.

¶19 We measure the reasonableness of the search by asking whether a reasonably prudent person in such circumstances would be warranted in the belief that a suspect may be armed. *See Kyles*, 269 Wis. 2d 1, ¶10. We employ an objective test to ascertain reasonableness, but the officer’s subjective motivations are part of the equation. *Id.*, ¶¶23, 29. We take into account that a frisk in a drug-related investigation can be supported by the nexus between drugs and weapons. *See State v. Guy*, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992); *State v. Johnson*, 2007 WI 32, ¶29, 299 Wis. 2d 675, 729 N.W.2d 182.

³ In any event, our supreme court has stated that “the odor of a controlled substance provides probable cause to arrest when the odor is unmistakable and may be linked to a specific person.” *State v. Secrist*, 224 Wis. 2d 201, 204, 589 N.W.2d 387 (1999). Though the inquiry into probable cause to search and probable cause to arrest are different, McCarthy’s search of the jacket was supported by probable cause because the odor of unburnt marijuana led McCarthy to believe evidence of a crime would be found. *See id.* at 209.

¶20 Moore emphasizes that McCarthy, when asked why he was concerned for his safety, answered, “I don’t know how to explain it to you. I didn’t get a good feeling talking to [Moore].” Moore asserts that McCarthy’s inability to articulate a basis for his concern demonstrates that there was no justification for a frisk. Had that been the extent of McCarthy’s statement, Moore’s argument might be persuasive. However, McCarthy’s full response indicated that he was concerned for his own safety and that of another officer because of Moore’s “making his way to the exit, the fact that his leg was shaking and the way he was answering questions.” McCarthy had detected the odor of unburnt marijuana on Moore, which confirmed to him he was in a drug-related situation. Also, the stop took place in a dimly lit basement at approximately 11:00 p.m. Under the totality of these circumstances, it was reasonable for McCarthy to have concerns for his safety and the safety of others and to frisk Moore for weapons.

¶21 Finally, we observe that McCarthy did not actually search Moore’s jacket until after Moore was secured in the squad car. Moore does not assert, nor could he, that the eventual search of his jacket was unreasonable. Although warrantless searches are per se unreasonable, there are specifically established and well-delineated exceptions to the warrant requirement. *See Young*, 294 Wis. 2d 1, ¶54. One of these exceptions is for searches incidental to a lawful arrest. *Id.*; *see also* WIS. STAT. § 968.10 (authorizing a search incident to arrest). The facts demonstrate that Moore’s arrest was supported by ample probable cause; accordingly, the search of his jacket, which produced the drug evidence, was incident to arrest and lawful.

CONCLUSION

¶22 McCarthy's investigatory stop of Moore was supported by reasonable suspicion. The totality of the circumstances surrounding the stop demonstrate that McCarthy's safety concerns justified a frisk for weapons. Moore's initial retreat, the odor of marijuana, Moore's flight up the stairs, and the physical struggle provided McCarthy with probable cause to arrest and to search his person incident to that arrest. The circuit court properly denied Moore's motion to suppress and we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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