

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2009

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. 2007AP2724-CR

Cir. Ct. No. 2006CF2646

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AARON LEE SIMMONS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Aaron Lee Simmons appeals from a judgment of conviction for possessing a firearm as a felon to challenge an order denying his suppression motion. Simmons did not yield to a show of authority and discarded a

gun and ammunition prior to being seized; we therefore conclude that the trial court properly denied his suppression motion. Therefore, we affirm.

¶2 Milwaukee Police Officer Bryant DeValkenaere testified at the suppression hearing that he and his partner were dispatched to a specific street corner and surrounding area to back-up two other officers who were responding to a large fight involving forty or fifty “younger, black males,” many of whom were “running away from the fight.” DeValkenaere testified that his specific assignment was “[t]o check the area ... [f]or people running away from the fight.”

¶3 DeValkenaere testified that he saw three people running from that area, one of whom was Simmons who was running on the sidewalk. DeValkenaere and his partner were in uniform, in a marked squad car. DeValkenaere exited the squad car and “yelled police. Stop.” At that time, he was approximately “ten, fifteen feet behind [Simmons].” Simmons reacted by “turn[ing] back and ma[king] eye contact with [DeValkenaere].” DeValkenaere testified that “[Simmons] slowed down and looked at us. Then turned [and ran] at a higher rate of speed after he saw me.” DeValkenaere testified that he “never lost sight of [Simmons],” and during the chase saw “[s]omething f[a]ll from [Simmons’s] person [about ten feet from a fence he was approaching] while he was running.” DeValkenaere then “heard a loud thud,” and saw “Mr. Simmons’ left arm [go] outward right before he hit the fence.” DeValkenaere “caught [Simmons] while he was halfway up the fence.” DeValkenaere then recovered a plastic case of .22 caliber ammunition where he had seen something drop from Simmons, and a .22 caliber pistol on a nearby porch in the direction from which DeValkenaere had heard the “loud thud.”

¶4 Simmons was charged with possessing a firearm as a felon, obstructing an officer, and carrying a concealed weapon. He moved to suppress the pistol, ammunition and other evidence DeValkenaere recovered, claiming that there was no reasonable suspicion to stop him. After an evidentiary hearing at which DeValkenaere and Simmons testified, the trial court found DeValkenaere more credible than Simmons and denied the motion. Simmons pled guilty to possessing a firearm as a felon, in violation of WIS. STAT. § 941.29(2) (2005-06).¹ The trial court imposed and stayed a sixty-month sentence, comprised of thirty-month respective periods of initial confinement and extended supervision, in favor of a three-year term of probation. Simmons appealed from the judgment to challenge the trial court's order denying his suppression motion pursuant to WIS. STAT. § 971.31(10).

¶5 This court applies a mixed standard of review to a suppression order: we affirm the trial court's factual findings unless they are clearly erroneous, but independently determine the constitutionality of the investigative stop. *See State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). We accept the trial court's findings predicated on DeValkenaere's testimony, who the trial court found more credible than Simmons. *See State v. Fields*, 2000 WI App 218, ¶11, 239 Wis. 2d 38, 619 N.W.2d 279.

¶6 Simmons challenges the denial of his suppression motion, contending that the officer did not have a reasonable suspicion that something unlawful might be afoot. *See State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

681 (1996). He contends that police had no reasonable suspicion when DeValkenaere identified himself and “yelled ... [s]top.” We do not address whether the police had reasonable suspicion to stop Simmons because Simmons failed to yield to a show of authority, discarding contraband prior to his seizure by police, thus invoking the application of *California v. Hodari D.*, 499 U.S. 621, 629 (1991). See *State v. Young*, 2006 WI 98, ¶¶39, 70, 294 Wis. 2d 1, 717 N.W.2d 729.

¶7 Simmons did not stop running in response to DeValkenaere, instead he ran faster, and was not seized until he was caught by DeValkenaere while scaling the fence. See *Hodari D.*, 499 U.S. at 626. Simmons discarded the ammunition and the pistol prior to being seized; consequently, suppression under the Fourth Amendment was not warranted. See *id.* at 625-26. It is therefore unnecessary to address the reasonable suspicion claim because Simmons did not yield to DeValkenaere’s show of authority and was not seized until he was physically apprehended at the fence after he had discarded the ammunition and the pistol.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

