

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

02-26-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP2358-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs

Jennifer L. Wilson,
Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

By: Carley N. Miller
Attorney for Plaintiff-Respondent
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
P.O. Box 23600
Green Bay, WI 54305-3600
(920) 448-4190

On appeal from the Circuit Court
of Brown County, Hon. Donald R. Zuidmulder,
Circuit Judge, presiding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF FACTS	2-5
STANDARD OF REVIEW	6
ARGUMENT	6-9
I. Officer Meves Had Reasonable Suspicion to Stop and Frisk the Defendant	6
a. Officer Meves’ Temporary Detention Of The Defendant Was Reasonable	6-7
b. Officer Meves’ Protective Pat-down Of The Defendant Was Reasonable	7-8
c. The Defendant Consented To The Retrieval And Examination Of The Envelope	9
CONCLUSION	10
CERTIFICATIONS	11-12

TABLE OF AUTHORITIES

CASES

Terry v. Ohio, 392 U.S. 1 (1968).....6, 7, 8

Adams v. Williams, 407 U.S. 143 (1972).....7

State v. Beaty, 57 Wis.2d 531 (1973).....8

State v. Kyles, 269 Wis.2d 1 (2004).....8

State v. Buchanan, 178 Wis.2d 441 (Wis. App. 1993).....6, 7, 9

State v. King, 175 Wis.2d 146 (Wis. App. 1993).....7

State v. Hartwig, 302 Wis. 2d 678 (Wis. App. 2007).....9

State v. Applewhite, 314 Wis. 2d 179 (Wis. App. 2008).....9

State v. Limon, 312 Wis. 2d 174 (Wis. App. 2008).....6

State v. Bridges, 319 Wis. 2d 217 (Wis. App. 2009).....8

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Fourth Amendment.....6

Wisconsin Constitution

Article I, §11.....6

Wisconsin Statutes

968.24.....6

968.25.....6

961.41(3g)(c).....2

961.573.....2

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2014AP2358-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs

Jennifer L. Wilson,
Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

STATEMENT OF FACTS

On April 8, 2014, in Brown County Circuit Court Branch I, Jennifer L. Wilson, hereinafter the defendant, plead guilty to possession of cocaine in violation of Wis. Stat. §961.41(3g)(c) and possession of drug paraphernalia in violation of Wis. Stat. §961.573. Plea and Sent. Tr. 2-6. Sentence was withheld, and the defendant was placed on probation for 18 months. *Id.* at 8-9. The defendant now appeals from that judgment, arguing that the trial court erred when it denied her motion to suppress evidence obtained by the arresting officer. In that motion, the defendant moved to suppress the evidence obtained following what the defendant contended was an unconstitutional search and seizure of her person.

On February 25, 2014, a motion hearing was held in Brown County Circuit Court Branch I, at which Green Bay Police Officer Mallory Meves testified. Officer Meves indicated that on October 21, 2012, at 9:39 pm, she was dispatched to a situation involving a suspicious vehicle in the area of 8th Street and South Oakland Avenue in the City of Green Bay. Mot. Hrg. Tr. 4:17-20, 5:24-6:1-13. Dispatch advised that the vehicle had parked near the alleyway of South Oakland Avenue. *Id.* at 6:18-20. Ofc. Meves testified that this area is “a known drug area.” *Id.* at 6:20-21. Dispatch indicated that the anonymous complainant reported that the vehicle parked, a female exited the vehicle, and walked down the alleyway. The complainant also specifically indicated it appeared “that a drug transaction was taking place.” *Id.* at 17:1-8. Officer Meves testified that

I've worked that area. I get to know my neighbors. I get to know my neighborhood. In that kind of area, there's frequent calls for drug activity. Particularly there was a drug house. I believe it was the 1200 block of South Oakland there's a drug house that we, you know, had been keeping an eye on, a lot of foot traffic, vehicle traffic, people park on a street then walk down the alley, vehicles out in front of the address random times, that kind of thing, and so that's what we were investigating.

Id. at 6:18-25, 7:1-5. Officer Meves also indicated that she was aware that the drug activity in the area concerned cocaine distribution; specifically, before being dispatched to the area, she was aware that a resident at the house had prior charges for cocaine, was a known cocaine and marijuana distributor, had violent tendencies, and had a warrant out for his arrest. *Id.* at 15:10-18.

Upon arrival, officers observed a vehicle that was consistent in location and appearance with the complainant's description. *Id.* at 8:4-11. Officer Meves testified that when she arrived on 8th Street facing eastbound, she observed Officer Meyer in his patrol car conducting a stop on the red truck. *Id.* at 8:15-21. As she approached, Officer Meves then “observed the female walking down the alley.” *Id.* at 8:22. Officer Meves indicated it took her approximately 10 to 15 minutes to respond to the initial call, which reported the female walking through the alley in a southbound direction. *Id.* at 9:14-23. When she observed the female in the alley

upon arrival, the female was walking northbound in the alley “returning back to the vehicle.” *Id.* at 9:24-25, 10:1-5. Officer Meves asked the female to stop, and testified that the female stopped approximately 10 feet away from her in the alley. *Id.* at 10:6-15. She testified that she identified the female as the defendant, Jennifer Leigh Wilson, female white, DOB 02/11/1971. *Id.* at 9:5-13.

Officer Meves specifically testified “I feel more comfortable approaching from my standpoint rather than having people approach me. I don’t know if they have weapons or anything like that on them.” *Id.* at 10:16-19. Officer Meves testified it was 9:39 pm and was dark in the alleyway. *Id.* at 10:20-25. She testified that there was no one else in the area other than the defendant, herself, and Officer Meyer and the other suspect near the red truck. *Id.* at 11:2-7. She indicated that there was “some activity from the house they were possibly coming from.” *Id.* at 11:5-7. Officer Meves indicated that the defendant appeared to be the person who was reported as walking away from the vehicle. *Id.* at 11:8-10. Officer Meves then explained that the “drug house” to which she had been referring was located at 1224 South Oakland Avenue, and indicated that residence was located about four houses to the south of where the red truck was parked. *Id.* 11:12-18. Officer Meves indicated that there was access to that residence from the alleyway and a driveway on the other street. *Id.* at 19-22.

Officer Meves approached the defendant, advised she was investigating a suspicious situation, and indicated she was going to pat the defendant down for officer safety to check for weapons or needles. *Id.* at 12:5-20. Officer Meves indicated she shone her light on the defendant, as it was dark and she wanted to ascertain what kind of safety risks existed. *Id.* at 17:23-25, 18: 1-7. She indicated that the defendant was detained given the need to investigate the reported suspicious circumstances. *Id.* at 18:10-19. Officer Meves indicated she asked the defendant if she had anything sharp or anything that was going to stab, poke, or cut her. *Id.* at 12:22-25. Officer Meves indicated that nothing was recovered. *Id.* at 13:4-10. As she was patting the defendant down, Officer Meves noticed in the left side of the defendant’s yellow fleece pullover some kind of padded envelope. *Id.* at 13:11-15. She testified that it did not feel normal, and felt like there was something that was “packaged funny” in there. *Id.* at 13:16-18. The defendant indicated it was a money envelope containing a per capita check. *Id.* at 13:20-21. Officer Meves asked if she could take a look at it. *Id.* at 13:21-23. The defendant indicated yes. *Id.* at 13:23. Officer Meves testified she asked if the defendant could take out the item so Officer Meves could ensure there were no weapons or contraband in there. The defendant removed the envelope and turned it over to Officer Meves. *Id.* at 14:9-12. Inside, Officer Meves located money notations, cash, and baggies containing a white substance. *Id.* at 13:25, 14: 1-3. Officer Meves testified that the two baggies in the envelope contained a white powder substance that appeared to be cocaine. *Id.* at 14:23-25. She indicated the substance later field tested positive for cocaine. *Id.* at 15: 1-9.

On cross-examination, Officer Meves testified that the vehicle was suspicious given

the time of day and that the vehicle was parked on the corner of the street and someone had gotten out. It – the occupant didn't go over to a home right near there. It – instead, the person had walked down the alleyway. You know, they didn't approach the house that they needed to go to or park in front of that house or even drive up the alley where there was a driveway for that residence. They're parked on the corner. The neighbors in the area have – I have a good rapport with the people in that area, and obviously given the time of day, you know, and parking there, it just seems kind of suspicious, you know, someone getting out, walking away, not frequenting a home in that area, but, rather, traveling elsewhere.

Id. at 16:3-16. Officer Meves clarified that her decision that something suspicious was occurring was based on 1) her prior knowledge about the area and the drug house; 2) the direction that the defendant appeared to be coming from; 3) the suspicious vehicle; 4) the report that the defendant was involved in some sort of drug activity and appeared to be coming from a known drug house; 5) her awareness, based on prior instances, that similar activity might involve the possession of weapons or use of weapons; and 6) her specific knowledge that the resident at the known drug house had violent tendencies and was known to carry weapons. *Id.* at 20:14-25, 21:1-19. Defense counsel asked Officer Meves what specifically made her feel that she might be in danger of physical harm such that a pat-down was necessary. *Id.* at 19:24-25, 20:1. She responded that “[a]nyone can have a weapon on them at any time. You know, I’ve pulled weapons off of 92-year-old men who posed no harm to me at all. So it’s just a safety thing. I don’t want to get stabbed with a needle.” *Id.* at 20:2-6.

In making its ruling regarding the reasonable suspicion for the detention, the Court specifically pointed to the fact that Officer Meves testified she is

very engaged in community policing. She testifies she knows the neighborhood. She knows the neighbors. She encourages conversation. She encourages all the things that modern police procedures have engaged in, and that is to make sure that the police and the community are one.... So in that context she’s dispatched to an area of the city to which she is personal familiar. She’s aware of the fact that there’s a drug house in the area. She observes a vehicle. The vehicle is not in a place or engaged in a process that would make it compatible with her understanding of the neighborhood because its in an area, hey, you walk up to that house, whatever it is, and instead of that she’s satisfied that the individual has – at least one individual had left that vehicle and is in an alleyway. It’s 9:39 at night. It’s dark. It’s in an alleyway in an area in which drug activity... occurs. She then engages that person, asks them to identify themselves. The person identifies themselves. The officer then asks the person to submit to a frisk.

Id. at 25: 13-25, 26: 1-9. With respect to the reasonableness of the frisk, the court specifically found, under the totality of the circumstances, that Officer Meves had

reasonable suspicion to believe that the defendant was either involved in a drug transaction or party to a drug transaction, and that Officer Meves was justified under *Terry* to conduct a pat-down for weapons. *Id.* at 27:15-21. The court indicated that the testimony portrayed the frisk as short and relatively non-intrusive. *Id.* at 26:10-17. The court found that the

frisk did not reveal any weapons, and under the law, the officer is precluded from proceeding any further by intruding. However, that isn't the testimony before the court. The testimony before the court is the officer asked Ms. Wilson whether she would remove the envelope or item that was in her – that was felt so the officer could determine whether or not there was any cash or contraband. Ms. Wilson had an absolute constitutional right to decline to do that, and I'm well satisfied then that if the officer had reached in, I would suppress it.

Id. at 26:18-25, 27: 1-4. The court stated Officer Meves' "testimony unequivocally is that the defendant reached in, handed the envelope over to her, and in doing that, that's a consent, and once that was done, the envelope is open. What's then there is in plain view, and, therefore, I can find there was no violation of the Fourth Amendment..." *Id.* at 27:25, 28:1-6. The court denied the defendant's motion to suppress. *Id.*

STANDARD OF REVIEW

The Fourth Amendment of the United States Constitution and Article I, §11 of the Wisconsin Constitution guarantee the rights of citizens to be free from unreasonable searches and seizures. “On appeal following the denial of a motion to suppress, [this court] ‘will uphold the court's findings of fact unless they are against the great weight and clear preponderance of the evidence. However, this court will independently examine those facts to determine whether the constitutional requirements of reasonableness [are] satisfied.’” *State v. Limon*, 312 Wis. 2d 174, 185-86 (Wis. App. 2008) (internal citations omitted).

ARGUMENT

I. Officer Meves Had Reasonable Suspicion to Stop and Frisk the Defendant.

“In *Terry v. Ohio*, 392 U.S. 1, 22 (1968), the United States Supreme Court recognized the legitimacy of an investigative stop: ‘[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.’” *State v. Buchanan*, 178 Wis.2d 441, 445-46 (1993). Wisconsin's statutory codification “of the constitutional requirements set forth in *Terry* is found at Wis. Stat. §§ 968.24 and 968.25.” *Limon*, 312 Wis. 2d at 186.¹

a. Officer Meves’ Temporary Detention Of The Defendant Was Reasonable.

In order to evaluate the reasonableness of Officer Meves’ conduct, it is necessary to balance the governmental need to search or seize against the intrusion

¹See Wis. Stat. §968.24 (“After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.”). *Also see* Wis. Stat. §968.25 (“When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public places by law abiding persons. If the law enforcement officer finds such a weapon or instrument, or any other property possession of which the law enforcement officer reasonably believes may constitute the commission of a crime, or which may constitute a threat to his or her safety, the law enforcement officer may take it and keep it until the completion of the questioning, at which time the law enforcement officer shall either return it, if lawfully possessed, or arrest the person so questioned.”).

upon the defendant's constitutionally protected interests. *Terry*, 392 U.S. at 20-21 (citation omitted). For the investigatory stop to be valid, Officer Meves must have had reasonable suspicion, in light of her experience, that some kind of criminal activity had taken or was taking place. *Buchanan*, 178 Wis. 2d at 446 (citation omitted). "Such reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' These facts must be judged against an 'objective standard...[?].'" *Id.* The Fourth Amendment does not require an officer who lacks probable cause to arrest "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). Rather,

Terry recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. at 145-46 (1972). The determination of the reasonableness of an investigatory stop "depends on the totality of the circumstances." *State v. King*, 175 Wis.2d 146, 150 (Wis. App. 1993) (citation omitted).

Under the totality of the circumstances, the investigatory stop at issue was reasonable. Officer Meves was dispatched to an area with which she is familiar, not only based on her community police procedures and neighborhood contacts, but also based on prior reports of drug activity occurring out of a specific house on the same block. She was familiar with prior calls for foot traffic, short-term traffic, and suspicious activity in the area and in the alleyway. She was aware that a particular resident from that house had a history of violence and drug distribution. She testified that she was aware, based on her experience, that drug activity often involves the use of weapons. Officer Meves testified she observed a vehicle matching the complainant's description that was not parked in a manner consistent with a normal visitor. An occupant had left the vehicle and walked up the dark alleyway at 9:39 pm in an alleyway in which drug activity occurred. The complainant had indicated it appeared a drug transaction was taking place. Officer Meves observed the defendant walking back towards the vehicle and asked her to stop and identify herself. The stop was brief and relatively non-intrusive. Based on the combination of those factors, and in light of her experience, Officer Meves had reasonable suspicion that some kind of criminal or drug-related activity had taken or was taking place, and was thus justified in making a brief, investigatory stop.

b. Officer Meves' Protective Pat-down Of The Defendant Was Reasonable.

In addition to the governmental interest in investigating crime, there is the more pressing interest of an officer to ensure "that the person with whom he is

dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” *Terry*, 392 U.S. at 23. This more immediate interest justifies the limited intrusion on individual rights that a protective frisk entails. *State v. Bridges*, 319 Wis. 2d 217, 231 (Wis. App. 2009) (citations omitted). In determining whether Officer Meves acted reasonably, “due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience.” *Id.* at 225 (citations omitted). During the investigative stop, Officer Meves was authorized to conduct a pat down to determine whether the defendant was armed because the facts underlying the investigatory stop, “taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 224 (citations omitted). The protective search of the defendant’s person was reasonable because the stop itself was reasonable, and Officer Meves reasonably believed that the defendant might be armed and dangerous. *Id.* (citations omitted). A determination of whether an officer had reasonable suspicion to effectuate a protective search for weapons is made “on a case-by-case basis, evaluating the totality of the circumstances.” *State v. Kyles*, 269 Wis.2d 1, 7 (2004).

Officer Meves testified she had been dispatched for the report of a possible drug transaction in an area known as a high-drug trafficking area. Her observation of the defendant walking in the alleyway towards the suspicious vehicle was consistent with the complainant’s description of a potential drug transaction involving a female entering the alley. Officer Meves indicated she shone her light on the defendant, as it was dark and she wanted to ascertain what kind of safety risks existed. She also testified that she was alone in the alleyway with the defendant while Officer Meyer was with the vehicle parked on the street. With respect to her experience, Officer Meves indicated that she has “pulled weapons off of 92-year-old men” who appeared to pose no threat to her. Officer Meves indicated that she was aware that the aforementioned drug activity in the area concerned cocaine distribution and was aware that the resident at the house was a known cocaine and marijuana distributor and had violent tendencies. She also indicated that she was aware that drug activity often involves weapons. She testified that based on all of those factors, she conducted a cursory pat down for weapons or contraband to ensure her own safety. The intrusion was brief, and was limited to a pat down of the defendant’s outer clothing. Officer Meves is “not required to take unnecessary risks in the performance of [her] increasingly hazardous duties.” *State v. Beaty*, 57 Wis.2d 531, 539 (1973). Given all of these factors, Officer Meves had reasonable suspicion to believe that the defendant may have been armed and dangerous, and was justified in conducting a cursory frisk of the defendant’s outer clothing.

c. The Defendant Consented To The Retrieval And Examination Of The Envelope.

When the pat-down itself is based on reasonable suspicion, the “plain feel” or “plain touch” exception to the warrant requirement may apply, and “when an officer touches or feels an object during a pat[-]down which his or her training and experience lead the officer to believe may be contraband, the officer is justified in retrieving the item.” *State v. Applewhite*, 314 Wis. 2d 179, 187 (Wis. App. 2008). Although there was no testimony that Officer Meves believed the envelope was or contained contraband, thus making the “plain feel” exception applicable, Officer Meves *did* testify to the fact that the defendant voluntarily turned over the envelope. The consent exception to the warrant requirement applies here. “A search conducted without a warrant or probable cause is, subject to a few specific exceptions, per se unreasonable under the Fourth and Fourteenth Amendments. One of these specific exceptions is consent.” *State v. Hartwig*, 302 Wis. 2d 678, 683 (Wis. App. 2007) (internal citation omitted). The fact that the defendant had been temporarily detained makes no difference to the determination that the defendant voluntarily turned over the envelope to Officer Meves. *Id.* at 686-687.

Officer Meves testified that the defendant indicated the bulge was an envelope containing a per capita check. Officer Meves asked if she could take a look at it. The defendant indicated yes. Officer Meves asked if the defendant could take out the item to ensure there were no weapons or contraband in there. The defendant removed the envelope and turned it over to Officer Meves. Officer Meves’ authority was evident by her uniform and weapon. Any “seizure” pursuant to the temporary detention was lawful, but the defendant was not immediately placed in handcuffs or otherwise confined. When Officer Meves asked about the concealed envelope, the defendant actively assisted—not just acquiesced—by taking out the envelope and turning it over to Officer Meves. Lastly, there is nothing in the record to suggest the defendant was particularly vulnerable to police intimidation. *See id.* at 687-688. The testimony presented to the court indicated that the defendant voluntarily turned the envelope over to Officer Meves and allowed her to look inside. Inside, Officer Meves observed 1) money notations, cash, and two baggies containing what appeared to Officer Meves to be cocaine; 2) Officer Meves had justification for being in the position from which she discovered the evidence in plain view (i.e., conducting a cursory pat down pursuant to an investigatory stop, during which the defendant provided consent for Officer Meves to search the envelope); and 3) the evidence, in and of itself, but especially in conjunction with all of the facts known to Officer Meves provided probable cause to believe that the defendant was engaged in some sort of drug activity. *See Buchanan*, 178 Wis.2d at 449. Because the defendant voluntarily consented to the search of the envelope, what was located inside in plain view is admissible evidence against the defendant.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the court affirm the findings of the jury and the Circuit Court.

Dated this 26th day of February, 2015.

Carley N. Miller
Attorney for Plaintiff-Respondent
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
Green Bay, WI 54305-3600
(920) 448-4190

CERTIFICATION
As To Form And Length

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and that the text is Times New Roman proportional serif font, 13 point body text, and 11 point text for quotes and footnotes. The Statement of Facts, Argument, and Conclusion Sections of this brief are nine pages and 3,857 words, including footnotes.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of February, 2015.

Carley N. Miller
Attorney for Plaintiff-Respondent
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
Green Bay, WI 54305-3600
(920) 448-4190

CERTIFICATION OF MAILING

I hereby certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on February 26th, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated this 26th day of February, 2015.

Carley N. Miller
Attorney for Plaintiff-Respondent
Assistant District Attorney
State Bar No. 1082284
Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
Green Bay, WI 54305-3600
(920) 448-4190