

**FILED
05-23-2022
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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP001656 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE E. BODIE,

Defendant-Appellant.

Appeal from an order denying suppression
and a judgment of conviction, both entered
in the Dane County Circuit Court,
the Honorable John D. Hyland, presiding.

BRIEF OF DEFENDANT-APPELLANT

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUE PRESENTED

Jesse Bodie was standing by a highway awaiting a ride home after experiencing car trouble. A state trooper approached and urged Bodie to get in his squad car for safety reasons. When Bodie reluctantly agreed, the trooper frisked him for weapons.

A frisk for weapons is lawful only if supported by reasonable suspicion that the subject of the frisk is armed and dangerous. *State v. Kyles*, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449. Here the trooper testified that he was trained to frisk everyone who gets into his squad car; that he thought Bodie's reluctance to get in his squad car was odd; that Bodie's tone shifted during their conversation; and that he knew Bodie had a record of driving violations.

Did the trooper have reasonable suspicion that Bodie was armed and dangerous?

The circuit court answered "yes." This Court should answer "no."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Bodie does not seek oral argument or publication of this Court's opinion.

STATEMENT OF THE CASE AND FACTS

One night, while driving on I-94 in Sun Prairie, Bodie had car trouble. (1:2). He got out safely, but his car was soon “engulfed in flames.” (1:2).

Firefighters responded and put out the fire while Bodie stood “a couple hundred feet west” and contacted a friend to come get him. (1:2; 101:7; App. 16). State troopers arrived a bit later. (101:14; App. 23). One of the responding troopers, Sou Xiong, was the sole witness at the suppression hearing. (101:2; App. 11). The facts that follow come largely from his testimony, which the circuit court deemed credible. (*See* 43:1; App. 5).

Bodie was still awaiting his ride when first responders began preparing to reopen the lanes they had closed due to the fire. (101:6; App. 15). At that point, Xiong approached Bodie. (101:6-8; App. 15-17). Xiong testified that he did not want Bodie “out on the side of the freeway” because he “didn’t want to risk him getting hit.” (101:8-9; App. 17-18). He “suggested” that Bodie get in his squad car. (101:9; App. 18). Bodie said he “would rather not.” (*Id.*; App. 18). Xiong then “urged” Bodie to get in his car for “safety reasons.” (*Id.*; App. 18). Once Bodie relented and agreed to get in Xiong’s car, Xiong frisked him. (101:23; App. 32).

Xiong testified there is no policy requiring a frisk before a citizen gets in a squad car, but “that’s how [they’re] trained.” (101:23; App. 32). He also noted that Bodie’s desire to wait outside seemed odd since it was in the 30s; that Bodie took “a more serious tone”

after being urged to get in his car, which he deemed suspicious; and that he was concerned about Bodie's record of driving violations. (101:10, 20; App. 19, 29).

The frisk revealed a handgun. (101:11; App. 20). Xiong asked Bodie whether he had a felony on his record, and Bodie said he did. (*Id.*; App. 20). Xiong thus handcuffed Bodie and took his gun. (*Id.*; App. 20). He then searched Bodie and found two bags containing drugs. (101:12; App. 21).

Bodie was charged with possession of a firearm as a felon and possession of methamphetamine. (1:1). He filed a motion to suppress, arguing, among other things, that he was unlawfully frisked. (36:2-3). The motion requested suppression of the gun, drugs, and any related statements he made. (36:3).

After a hearing (101; App. 10-47), the circuit court denied suppression (43; App. 5-9). It held that Xiong "had a reasonable basis upon which to conduct a pat down of Bodie prior to having him enter the squad car." (43:1; App. 5). In reaching this conclusion, it relied heavily on *State v. Nesbit*, 2017 WI App 58, 378 Wis. 2d 65, 902 N.W.2d 266, another case regarding a frisk on the side of a highway. (43:2-5; App. 6-9). Details regarding the court's application of *Nesbit* to the facts of this case are discussed later on.

Following the circuit court's suppression decision, Bodie entered no-contest pleas to both counts and was sentenced to 10 years of imprisonment. (64:8-9; 48:1; App. 3). This appeal follows.

ARGUMENT

I. **No specific, articulable facts gave rise to reasonable suspicion that Bodie was armed and dangerous.**

A. Overview of argument.

All Bodie did to raise Trooper Xiong's suspicions was speak in a more serious tone when saying he would rather not wait for his ride in Xiong's squad car. Unlike the defendant in *Nesbit*, Bodie was not answering a question about weapons when this shift in tone occurred; he was telling Xiong he wanted to keep standing outside. In this context, Bodie's tone did nothing to suggest he was hiding a weapon. Instead, it conveyed that he preferred mild winter weather to the back of a squad car. Nothing else in the record—not Bodie's preference for the mild winter weather, not his record of driving infractions, not the state troopers' policy of conducting frisks before letting people into their squad cars—suggested Bodie was carrying a weapon or might use it on Xiong or anyone else.

Because Xiong lacked reasonable suspicion that Bodie was armed and dangerous, the frisk here was unlawful. The evidence it produced, and the evidence derived from it, should be suppressed.

B. Standard of review.

This Court reviews the constitutionality of a weapons frisk de novo, but grounds its analysis in the

circuit court's findings of fact unless they are clearly erroneous. *Nesbit*, 378 Wis. 2d 65, ¶5.

C. Constitutional principles.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against “unreasonable searches.” A frisk is a search for weapons in which an officer feels a person’s “outer clothing.” *Terry v. Ohio*, 392 U.S. 1, 29-30, (1968). A frisk is reasonable when there are “specific and articulable facts which, taken together with rational inferences,” give an officer reasonable suspicion that a person is armed and dangerous. *See Kyles*, 269 Wis. 2d 1, ¶¶9-10.

Given this standard, a broad policy that citizens must be patted down before getting into a squad car is not a valid justification for a frisk. *State v. Hart*, 2001 WI App 283, ¶¶14-19, 249 Wis. 2d 329, 639 N.W.2d 213, *overruled on other grounds by State v. Sykes*, 2005 WI 48, ¶¶32-33, 279 Wis. 2d 742, 695 N.W.2d 277. Nor is an officer’s “inchoate and unparticularized suspicion or ‘hunch’” that a person might be armed. *Terry*, 392 U.S. at 27. Only articulable facts within the officer’s knowledge and “specific reasonable inferences which he is entitled to draw from th[ose] facts” factor into a reviewing court’s assessment of “whether [an] officer acted reasonably” in conducting a weapons frisk. *Id.*

D. Governing case law.

The parties and circuit court focused on *Nesbit* due to its factual similarities with this case.

Nesbit and a friend were driving on I-94 when they ran out of gas. *Nesbit*, 378 Wis. 2d 65, ¶1. They began walking along the shoulder of the road, gas can in hand. *Id.* A state trooper saw them and pulled over “out of concern for their safety and because walking along the highway is illegal.” *Id.* The trooper said he’d give the men “a ride to the gas station and back.” *Id.*, ¶2. Before letting them into his squad car, though, the trooper asked if they had any weapons. *Id.* Nesbit’s friend said no in a normal tone, but Nesbit became “very deflated” and quietly shook his head. *Id.* A frisk revealed that Nesbit had a gun and drugs on him. *Id.*

The trooper later testified that he followed his department’s policy by frisking the men before letting them into his squad car. *Id.*, ¶3. But he also testified that “Nesbit’s noticeable change of attitude” led him to frisk Nesbit first, and to take precautions. *Id.*, ¶4.

In reviewing the validity of the frisk, the court of appeals observed that “the fact that the search was going to happen” no matter what neither created nor negated reasonable suspicion. *Id.*, ¶9. The inquiry is objective: would the specific, articulable facts known to the trooper when he conducted the frisk have led a reasonable law enforcement officer to suspect that Nesbit had a weapon and might use it to harm someone? *See id.*

The court then turned to “Nesbit’s response to the question of whether he had any weapons on his person,” which involved a marked shift in demeanor. *Id.*, ¶11. Nesbit went from “talking and pointing” to

“deflated” with “his arms ... down at his side,” the court remarked. *Id.* “A reasonably prudent officer seeing this response *to a question about weapons* would be suspicious and wonder if the answer”—a sullen head shake—“was truthful.” *Id.*, ¶12 (emphasis added).

The court also noted that the trooper “was by himself and was going to escort two individuals ... one of whom [he] had reason to believe was armed and may have just lied to him about that fact.” *Id.*, ¶14. On these facts, the court held, “a reasonably prudent officer would be concerned for his or her safety.” *Id.*

Nesbit did not draw a bright-line rule that a frisk is reasonable whenever an officer perceives a shift in tone or wants a citizen to get into a squad car. *See id.*, ¶15, n.2. Assessing whether an officer has reasonable suspicion that a citizen is armed and dangerous is a case-by-case, fact-intensive task.

United State v. Monsivais, 848 F.3d 353 (8th Cir. 2017), another side-of-the-interstate frisk case, shows how subtle factual differences can lead a reviewing court to a different conclusion.

One fall day, Marcelo Monsivais was “walking east on the ... Interstate away from an apparently disabled truck.” *Id.* at 356. Two officers spotted him and drove up “to offer him roadside assistance.” *Id.* Monsivais kept walking, so the officers got out of their squad car and began asking questions. *Id.* Monsivais seemed “nervous and jittery” but “was polite in responding.” *Id.* He also “repeatedly put his hands in

his pockets, but took them out each time” an officer asked him to. *Id.*

After about four minutes of conversation, one of the officers announced he would frisk Monsivais “because of his behavior” and for “officer safety reasons.” *Id.* During the frisk, the officer found a gun, drugs, paraphernalia, and an expired passport. *Id.*

The Fifth Circuit concluded that the nervous, evasive behavior Monsivais exhibited before the frisk did not give rise to reasonable suspicion. *Id.* at 361. “The context in which a person seeks to avoid contact with a peace officer is important,” it explained. *Id.* at 360. When there is a factual link between a person’s avoidance of police and some “reasonably suspected criminality,” a frisk may be justified. *Id.* at 361. But without that link, a person’s “exercise of his right to avoid contact with the police and to go about his business” provides no justification for a frisk at all. *Id.*

In sum, the context of Nesbit’s shift in tone (a question about weapons) just barely gave rise to reasonable suspicion. The context of Monsivais’s avoidant tactics (an offer of roadside aid) did not.

E. Xiong frisked Bodie based on his department’s policy and a hunch that Bodie might have a weapon or drugs. That violated the Fourth Amendment.

Xiong only perceived a shift in tone when he pushed Bodie to get in his squad car for safety reasons. Bodie wanted to be left alone outside, and he took a

“more serious” tone in conveying that to Xiong. Thus, Bodie was like Monsivais: he wanted to keep his distance from an officer rendering aid. Because there was no factual link between Bodie’s shift in tone and any suspicions Xiong may have had about weapons or dangerousness, his tone did not give rise to reasonable suspicion that he was carrying a weapon or might use it. The circuit court erred in denying suppression.

The circuit court made few findings of fact regarding the events leading up to the frisk, as Xiong and Bodie interacted only briefly before Xiong patted Bodie down. It found that “Bodie’s attitude changed” when Xiong “decided that they should sit and wait in his squad car.” (43:1-2; App. 5-6). It also found that Bodie had been waiting outside, with the temperature in the 30s, for about an hour when Xiong requested that he get in the car. (43:2; App. 6). Finally, the court found that after Xiong “discussed the safety issues,” Bodie agreed to get in the car, after which Xiong frisked him. (*Id.*; App. 6).

Not even under *Nesbit* did Bodie’s behavior give Xiong reasonable suspicion that he was armed and dangerous. Context is everything. The court of appeals called *Nesbit* “a close case” but held that “one key fact” (*Nesbit*’s demeanor change when answering a question about weapons) and “the rational inferences to be drawn therefrom” (that *Nesbit* might be concealing his possession of a weapon) were sufficient to justify the frisk. 378 Wis. 2d 65, ¶10. The *Nesbit* court also noted that *Nesbit* and his friend were breaking the law by walking on the side of the highway

and thus had no choice but to get in the squad car. *Id.*, ¶2. Finally, the *Nesbit* court emphasized that there were two citizens getting into a squad car with “a single unprotected officer.” *Id.*, ¶8.

In this case, the key fact of Bodie’s shift in tone arrived not in response to a question about weapons, but in response to Xiong’s insistence that he sit in a squad car to wait for his ride. Without a link between Bodie’s shift in tone and the issues of whether he was armed or dangerous, any inferences Xiong drew about the latter were mere hunches. And at the time of the frisk, Bodie wasn’t required to get in the squad car, because it was not illegal for him to await his ride outside; it was simply Xiong’s preference that he get in the car. Finally, Bodie was one just one person; Xiong was not outnumbered, and even as first responders began to disperse, nothing in the record suggests he was alone.

As for the other facts in the record:

- The state troopers’ policy of frisking people before letting them into their squad cars did not make it any more likely that Bodie was armed and dangerous. An across-the-board policy does not create the particularized suspicion the Constitution demands.
- Bodie’s preference for waiting outside rather than in the back of a squad car is not inherently suspicious. It was cold, but 30-35 degrees is comfortable for many

Wisconsinites. Bodie would also have had an easier time spotting his ride outside. Finally, while Xiong offered up his vehicle as a safer place for Bodie to wait, not everyone feels safe in a squad car.

- Bodie's poor driving record shows he has had trouble following the rules of the road. Xiong's knowledge of that record did not give him any reason to suspect Bodie was armed and dangerous. The former does not lead to, or even suggest, the latter.

Xiong had a hunch that Bodie had a gun or drugs. He did not have reasonable suspicion that Bodie was armed and dangerous. His frisk of Bodie was therefore unconstitutional.

F. Suppression is the appropriate remedy.

The exclusionary rule applies to evidence recovered during an unlawful weapons frisk and to derivative evidence rooted in the frisk. *See Kyles*, 269 Wis. 2d 1, ¶¶1-2. Thus, the gun and drugs Xiong discovered when unlawfully frisking Bodie, as well as all derivative evidence, should be suppressed.

CONCLUSION

Jesse E. Bodie respectfully requests that this Court reverse the circuit court's decision denying suppression and remand the case with instructions to vacate the judgment of conviction, allow him to withdraw his no-contest pleas, and order suppression of all evidence discovered during the unlawful frisk, as well as all evidence derived therefrom.

Dated this 23rd day of May, 2022.

Respectfully submitted,

Electronically signed by
Megan Sanders-Drazen

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,637 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of May, 2022.

Signed:

Electronically signed by

Megan Sanders-Drazen

MEGAN SANDERS-DRAZEN

Assistant State Public Defender