

**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. 2008AP408-CR

Cir. Ct. No. 2007CF285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BYRON PRESTON REEVES, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Byron Preston Reeves, Jr., appeals from a judgment of conviction for possessing cocaine to challenge an order denying his suppression motion. The issue is whether the police had reasonable suspicion to justify detaining Reeves. We conclude that they did, and that the investigative

stop of Reeves was constitutionally reasonable, rendering valid his subsequent arrest and search during which police discovered he was carrying cocaine. Therefore, we affirm.

¶2 Milwaukee Police Officer Alan Schleif was on patrol when a general police radio broadcast reported that an armed robbery had occurred in the neighborhood in which Schleif was patrolling ten or fifteen minutes earlier. The broadcast described the suspect as a “black male wearing a black winter jacket, approximately five foot eight or so.”

¶3 Within minutes of that report, Schleif saw a black man wearing a black jacket of that approximate height running from a gasoline station in that same neighborhood.¹ Schleif and his partner stopped the squad car and approached Reeves. They told Reeves that they “needed to speak to him. That he had matched a possible match to a description of a robbery, which had recently occurred in the area.” Schleif described Reeves as cooperative, telling police his name when asked. Police also asked Reeves “what he was doing,” to which Reeves responded “that he was just coming from the gas station and headed to his friend’s house.” While Reeves was answering the officer’s questions, the other officer conducted a record check and discovered an outstanding warrant for a probation violation. Consequently, police arrested Reeves, and when they searched him, they discovered that he had crack cocaine in his pocket.

¶4 Reeves was charged with possessing cocaine as a subsequent drug offense. He moved to suppress the evidence, challenging the reasonableness of

¹ That gasoline station was not where the reported armed robbery had occurred.

the investigative stop that led to his arrest, and subsequent search. Following an evidentiary hearing, at which Schleif and Reeves testified, the trial court denied Reeves's suppression motion. Reeves then pled guilty to possessing cocaine as a subsequent drug offense, in violation of WIS. STAT. §§ 961.41(3g)(c) and 961.48 (2005-06).² The trial court imposed and stayed a one-year sentence in favor of an eighteen-month term of probation. Reeves appeals to challenge the order denying his suppression motion. *See* WIS. STAT. § 971.31(10).

¶5 “The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause.” *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). “[T]he law must be sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect.” *State v. Guzy*, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987). The test to determine the constitutionality of an investigative stop is an objective one, focusing on reasonableness; common sense dictates what constitutes reasonableness. *See Waldner*, 206 Wis. 2d at 55-56 (citing *State v. Anderson*, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990)). We consider “[w]hat ... a reasonable police officer [would] reasonably suspect in light of his or her training and experience. This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility.” *Id.* (citation omitted). “The focus is on reasonableness.” *Guzy*, 139 Wis. 2d at 679.

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

¶6 A constitutionally valid investigative stop is described as follows:

To execute a valid investigatory stop, *Terry v. Ohio*, 392 U.S. 1, 30 (1968)] and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *Terry*, 392 U.S. at 30; sec. 968.24, Stats. Such reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” [*Terry*, 392 U.S.] at 21. These facts must be judged against an “objective standard: would the facts available to the officer at the moment of the seizure ... ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” *Id.* at 21-22.

State v. Richardson, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (omission in *Richardson*).³ “Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” See *Waldner*, 206 Wis. 2d at 59 (citing *Anderson*, 155 Wis. 2d at 84). “[I]f any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.” *Anderson*, 155 Wis. 2d at 84 (citation omitted). “We look to the totality of the facts taken together... [and whether those collective] facts g[i]ve rise to a reasonable suspicion that something unlawful might well be afoot.” *Waldner*, 206 Wis. 2d at 58. The reasonableness of the officer’s suspicion is assessed within the totality of the circumstances at the time of the stop. See *id.*

³ WISCONSIN STAT. § 968.24 codifies *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny.

¶7 The trial court denied Reeves's suppression motion.

Clearly, Mr. Reeves is an African-American. And so there is a concern any time black, white, whatever that someone is stopped just because of their race. But what [the trial court] heard here is that there were indications of a robbery. That there was some information regarding the description of the person admittedly, not very specific, height 5'8". That's a lot of folks with black jackets. Black jackets are common, absolutely correct. When the officer sees Mr. Reeves running the question is, [d]oes that law enforcement officer have reasonable suspicion that something might be wrong? That there might be a match with the person that they had received this rather general description. And what [the trial court] heard from the system is the officer came up and stopped him and told him why they were stopping him and asked him some questions. And Mr. Reeves was cooperative, and they ran a record check and he had a warrant.

[The trial court] do[es]n't know if [it] can say to law enforcement when a robbery occurs and say, well, don't stop these other people.... [The trial court] think[s] they were just trying to see if this individual was involved. They stopped and asked him some questions. They were appropriate. [The trial court] didn't get any indication that they were rude to him. They just asked him questions, and they did a record check as they normally do; and he had a warrant, and he got arrested.

¶8 This court reviews a suppression order according to a mixed standard of review: we affirm the trial court's factual findings unless they are clearly erroneous, but determine the constitutionality of the investigative stop independently. See *Richardson*, 156 Wis. 2d at 137-38. The factual findings are not the principal dispute; the dispute focuses on the inferences from those findings and the reasonableness of the police in stopping Reeves in the context of the totality of the circumstances.

¶9 Schleif testified that the man he saw (Reeves) matched the description of the suspect, and Reeves was "within a three to four block area" of

the scene of the reported crime. Schleif testified that “[w]hat drew our attention to him [was that] he was running. There was a gas station at the corner of Chavez and Greenfield. And when we saw him, he was running away from the gas station.”

¶10 Reeves contends that in that neighborhood in winter, a black male, five feet eight inches tall, in a black winter coat is too generic a description to justify the investigative stop, particularly when Reeves is three inches shorter than the suspect’s reported height. Reeves then parses the suspect’s description, explaining why it was too generic. Reeves also contends that the height discrepancy between himself and the suspect should have removed him from consideration, and that his running would have placed him much further from the scene of the crime. Reeves further contends that once police stopped him and asked him why he was running, his reasonable explanation should have terminated the investigative stop. Reeves essentially claims that he was a black man in the wrong place at the wrong time.

¶11 Reeves contends that the generic description of a black man in dark clothes was likely to encompass many of those in the neighborhood, relying on *State v. Alexander*, 2005 WI App 231, ¶12, 287 Wis. 2d 645, 706 N.W.2d 191. *Alexander* is distinguishable. In *Alexander*, the suspect was described as “a black male wearing a [black] thigh-length coat with fur around the hood,” who was also wearing “dark pants” and carrying an unknown type of gun. *Id.*, ¶2. Twenty-six hours later, police stopped Alexander who was

walking ten blocks east of the crime scene, wearing a black skull cap, black waist-length jacket, and black pants. When approached, Alexander allegedly “stutter-stopped,” paused one or two seconds, and avoided eye contact, but continued walking and neither fled nor changed direction. Based on Alexander’s perceived hesitation, aversion to eye contact,

and similarity to the description in the crime summary
[police stopped him.]

Id., ¶4. This court held that suppression was warranted because police could not justify stopping a black man in a waist-length jacket without a hood or fur, twenty-six hours after the reported incident. *See id.*, ¶14.

¶12 Reeves loses sight of the test for conducting an investigative stop, and instead parses each detail of the reported description of the suspect, and each detail of his own conduct before and during the stop to criticize the generic nature of the suspect’s description and to provide innocent explanations to detract from the reasonableness of the police’s suspicion. Preliminarily, “police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *Anderson*, 155 Wis. 2d at 84. Moreover, the proper approach is to consider the totality of the circumstances, not each factor in isolation from the others. *See Waldner*, 206 Wis. 2d at 58 (“the sum of the whole is greater than the sum of its individual parts”). The test is whether the totality of the circumstances supports “a reasonable suspicion that something unlawful might well be afoot.” *Id.*

¶13 Reeves contends that skin color and a black winter coat are too generic in the neighborhood in issue on a cold, winter evening to warrant an investigative stop; he also contends, however, that the three-inch height difference is so specific that it should have excluded him from consideration as a suspect. Reeves is a black male, wearing a black winter coat, and was within a few blocks of the reported crime. Schleif saw Reeves running in the distance; a three-inch height differential under those circumstances does not necessarily exclude him for purposes of an investigative stop. The totality of the circumstances renders reasonable Schleif’s investigative stop of Reeves, “to temporarily freeze [the] situation,” particularly when it was reasonable for Schleif to believe that if he did

not stop Reeves, the armed robbery suspect described similarly to Reeves, could have disappeared. See *Guzy*, 139 Wis. 2d at 675-76; *Waldner*, 206 Wis. 2d at 59 (“The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape.”).

¶14 Reeves further contends that once he was cooperative and provided a reasonable explanation for why he was running from the gasoline station, police had no reason to run a record check. Although police were not compelled to conduct a record check, even Reeves acknowledges that there was nothing improper about doing so. The totality of the circumstances and the reasonable inferences and cumulative effect of Reeves’s conduct, as observed by Schleif, were sufficient to support his reasonable suspicion that Reeves should be temporarily detained to determine whether he was involved in the recent armed robbery reported in that neighborhood.

By the Court.—Judgment affirmed.

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

