

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2008

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. 2007AP1558-CR

Cir. Ct. No. 2005CF192

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD LYONS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
S. MICHAEL WILK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ronald Lyons appeals from a judgment convicting him of crimes arising from a home invasion: kidnapping, burglary while armed with a dangerous weapon and armed robbery, all as party to the crime. On appeal, Lyons argues that the circuit court erroneously denied his motion to suppress his

inculpatory statements because the police officer who stopped him had neither reasonable suspicion for the stop nor probable cause to arrest. We affirm because the stop was supported by reasonable suspicion derived from articulable facts and therefore lawful under *Terry v. Ohio*, 392 U.S. 1 (1968).

¶2 A police officer may stop a person on less than probable cause, the standard for arrest. *State v. Waldner*, 206 Wis.2d 51, 59, 556 N.W.2d 681 (1996). To justify an investigatory seizure, or *Terry* stop, the officer “must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.” *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted). “The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *Id.* (citing *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997)).

¶3 At the hearing on Lyons’ motion to suppress, Officer Ball testified that on February 20, 2005, at 5:40 a.m., he was on his way to the department to begin his shift when he heard a police radio transmission about a home invasion and fleeing suspects who were reportedly armed. Officer Ball made his way to the department through the area of the reported crime in the hope of intercepting or observing a suspect. Shortly after the transmission and when he was approximately five blocks from the crime scene, Officer Ball observed a subject, later identified as Lyons, running in the area. It was early in the morning, snowing and slippery with very little traffic and no other pedestrians. Lyons, a black male, was wearing dark clothing and did not appear to be running for pleasure.

¶4 Officer Ball, who was in uniform but driving his personal vehicle, maneuvered his vehicle to get a better look at Lyons, who was now walking. Officer Ball observed that Lyons was looking around in all directions as if he was looking for something or as if he was nervous. Lyons started walking briskly, and Officer Ball passed Lyons, notifying squad cars ahead of him of Lyons' location. Officer Ball believed that Lyons may have been involved in the home invasion given his proximity to the scene, his description, and his suspicious actions. Officer Ball pulled in behind a snow bank while maintaining visual contact with Lyons and waiting for the squads to respond. By the time Lyons walked past Officer Ball's location, Officer Ball had exited his vehicle and was positioned on top of a snow bank watching Lyons.

¶5 When Officer Ball's police radio sounded, Lyons looked at Officer Ball. Lyons tensed and started to take a longer stride which, in Officer Ball's experience, was a prelude to running. Officer Ball drew his weapon, yelled "police, stop," ordered Lyons to the ground and handcuffed him. Officer Ball detained Lyons for approximately two minutes before other squads responded to assist.

¶6 Officer Ball detained Lyons to find out what, if any, involvement, he may have had in the home invasion. Officer Ball believed Lyons was involved in the home invasion based upon "[h]is leaving the scene of the incident, the fact after approaching him and ascertaining he was a male black, which was the description provided by other officers at the scene, his movements of looking around as if he was looking to see if somebody was following him." Officer Ball explained that he drew his weapon because he was alone, in uniform, did not emerge from a police vehicle, had information that the home invasion suspects were armed, Lyons matched the description of the suspects in the crime (black

male in dark clothing), and he believed Lyons was one of the suspects. Therefore, to protect himself, Officer Ball drew his weapon. Officer Ball's protective pat down did not locate a weapon.

¶7 In ruling on the motion to suppress, the circuit court applied the *Terry* reasonable suspicion standard. The court found that Officer Ball heard the dispatch about the possible home invasion involving multiple, possibly armed black men. Officer Ball had this information when he observed Lyons within blocks of the crime scene running and then walking while looking around. There were few people out in the early morning hours, it was snowing and Lyons fit the general description of the suspects. Lyons engaged in furtive movements that suggested he was about to flee Officer Ball. Under the totality of the circumstances, Officer Ball properly suspected Lyons of involvement in a crime, had the right to handcuff Lyons for his own safety; the handcuffing did not convert a legal *Terry* stop into an arrest. The court was “satisfied that under the totality of the circumstances, there was a reasonable suspicion that the suspect was armed or dangerous based on the” facts found and relied upon by the court.

¶8 Lyons pled guilty and now challenges this ruling on appeal. WISCONSIN STAT. § 971.31(10) (2005-06) (appellate review of a suppression ruling available even if the defendant pled guilty).

¶9 As a preliminary matter, we clarify the issue on appeal. At the suppression hearing, Lyons argued that he was arrested without probable cause. However, the circuit court, in denying Lyons' suppression motion, ruled that Lyons was lawfully temporarily detained under *Terry* and that Officer Ball's use of his weapon and handcuffs to detain Lyons did not convert the stop into an arrest. On appeal, Lyons argues that Officer Ball arrested him and did not merely

detain him via a *Terry* stop. We disagree and hold that Officer Ball's encounter with Lyons was a *Terry* stop, not an arrest.

¶10 In reviewing the circuit court's ruling on a suppression motion, we will uphold its findings of fact unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). It was the role of the circuit court, as the fact finder, to weigh the credibility of the testimony. *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). The circuit court's findings were not clearly erroneous based upon the record before us.

¶11 We turn to whether the facts found by the circuit court satisfy the standards for a *Terry* stop. Whether a stop meets constitutional and statutory standards is a question of law that we review de novo. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶12 The facts found by the circuit court satisfy the *Terry* standards of "reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." *See Colstad*, 260 Wis. 2d 406, ¶8 (citation omitted). Officer Ball, relying upon information received via radio transmissions about a possible crime, its location, and a description of a suspect or suspects, located Lyons in the vicinity in circumstances that appeared suspicious. Officer Ball had specific articulable facts suggesting that Lyons violated the law. Applying the common sense test, *see id.*, a reasonable officer in Officer Ball's position and with his training and experience would reasonably suspect Lyons. Officer Ball need not have weeded out all explanations consistent with innocent activity before acting on the specific articulable facts he possessed. *See Waldner*, 206 Wis. 2d at 60.

¶13 Finally, we address the significance of Officer Ball’s use of his weapon and handcuffs during the stop. Officer Ball testified that the circumstances of the encounter with Lyons—an officer without backup and a possibly armed suspect—led him to draw his weapon and handcuff Lyons for his own safety. Based upon this testimony, the circuit court correctly concluded that these actions were properly taken in furtherance of Officer Ball’s safety during the stop. We agree that Officer Ball’s actions did not convert the *Terry* stop to an arrest on less than probable cause.

¶14 The court in *United States v. Tilmon*, 19 F.3d 1221, 1225 (7th Cir. 1994), acknowledged that in conducting a *Terry* stop, “which is always a stop made at ‘close range,’ police officers must make a quick decision about how to protect themselves and others from possible danger.” The court observed that “[t]he mere use or display of force in making a stop does not necessarily transform a stop into an arrest if the surrounding circumstances give rise to a justifiable fear for personal safety.” *Id.* at 1226. Handcuffing does not, “in all circumstances transform a stop into an arrest. In fact, handcuffing—once highly problematic—is becoming quite acceptable in the context of a *Terry* analysis.” *Id.* at 1228 (footnote omitted). As the *Tilmon* court noted, “[f]or better or for worse, the trend [in *Terry* law] has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.” *Id.* at 1224-25.

¶15 In *Tilmon*, the officers knew via a radio transmission that the robbery suspects were armed. *Id.* at 1227. Once Tilmon’s vehicle was stopped, the officers, with weapons drawn, ordered him out of the vehicle, and required him to lie face down on the roadway. *Id.* at 1223. Tilmon was then handcuffed and

placed in a squad car. *Id.* The court held that this was a lawful *Terry* stop. *Id.* at 1227.

¶16 In considering the show of force against Tilmon, the court considered “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.* at 1227 (citing *Terry*, 392 U.S. at 27). The court held that the police were justified in making a show of force to protect themselves and passersby in light of their knowledge that Tilmon was armed. *Tilmon*, 19 F.3d at 1228.

¶17 We apply *Tilmon* and conclude that Officer Ball’s lawful *Terry* stop of Lyons was not transmuted into an arrest by the use of handcuffs and a weapon. *See Tilmon*, 19 F.3d at 1224-25; *Cf. State v. McGill*, 2000 WI 38, ¶38, 234 Wis. 2d 560, 609 N.W.2d 795 (frisk may be performed while a suspect is handcuffed if the officer applies restraint in order to protect him or herself during a *Terry* frisk).

By the Court.—Judgment affirmed.

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

