

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 23, 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 Nos. 2008AP437-CR  
2008AP438-CR  
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2006CF906  
2006CM910**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WOODROW H. GARRETT,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments of the circuit court for Rock County:  
JAMES P. DALEY, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Woodrow Garrett appeals from judgments convicting him of receiving stolen property, theft of movable property, carrying a concealed weapon and burglary, the latter two counts as a repeater. Garrett argues that the circuit court erred by denying his pretrial suppression motion because the

officer lacked the requisite reasonable suspicion to initiate a stop of the vehicle in which Garrett was a passenger. We agree. Because the evidence should have been suppressed as the result of an unconstitutional stop, we reverse the judgments of conviction and remand the matter for further proceedings.

### **BACKGROUND**

¶2 In Rock County Circuit Court Case No. 2006CF906, an information charged Garrett with burglary, misdemeanor theft, possession of cocaine, carrying a concealed weapon and possession of narcotic drugs, all as a repeater. In Rock County Circuit Court Case No. 2006CM910, a complaint charged Garrett with receiving stolen property. The circuit court denied Garrett’s pretrial suppression motion. Upon his no contest plea, Garrett was subsequently convicted of receiving stolen property in Case No. 2006CM910. A jury trial was held in Case No. 2006CF906 and Garrett was acquitted of the drug possession charges, but convicted of burglary, misdemeanor theft and carrying a concealed weapon. The court imposed five years of initial confinement and five years of extended supervision on the burglary conviction, and nine months in jail on each of the remaining three offenses—the sentences to run concurrently with each other but consecutive to a sentence Garrett was already serving. This appeal follows.

### **DISCUSSION**

¶3 Garrett challenges the circuit court’s denial of his pretrial suppression motion.<sup>1</sup> When reviewing an order on a motion to suppress, we

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<sup>1</sup> The State asserts Garrett makes no argument challenging his conviction in Rock County Circuit Court Case No. 2006CM910 for receiving stolen property. The stolen property, a checkbook, was discovered on Garrett when searched following the vehicle stop that forms the  
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uphold the circuit court's factual findings unless clearly erroneous. *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404, *review denied*, 2008 WI 6, 306 Wis. 2d 48, 744 N.W.2d 297. However, the application of constitutional principles to those facts is a question of law that we review independently. *Id.* Here, the facts are undisputed, and thus only questions of law are before us. *See id.*

¶4 Whether an investigatory stop was legally justified presents a question of law that we decide independently. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). An investigatory stop is permissible if the law enforcement officer reasonably suspects, considering the totality of the circumstances, that the individual is committing, is about to commit, or has committed a crime or a non-criminal traffic violation. WIS. STAT. § 968.24 (2007-08); *State v. Popke*, 2009 WI 37, ¶¶13-14, 23, 765 N.W.2d 569. The officer's suspicion must be "grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).

¶5 At the suppression motion hearing, City of Beloit police officer Tracey Summers testified that at 7:41 a.m. on the morning of March 29, 2006, he responded to a possible robbery in progress at St. John's Church and had been informed that the suspect was a tall, thin, black male wearing glasses. Responding initially to the area northwest of the church, Summers was informed by a woman there that "nobody had run by that location." Summers then responded to an area

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basis of Garrett's suppression motion. Garrett's challenge to the stop, therefore, includes a challenge to his conviction for receiving stolen property.

approximately 200 yards southwest of the church, and observed a white male “walking hurriedly” between the adjoining driveways of two residences, eventually entering the passenger side of a vehicle parked on the street. According to Summers, the subject, later identified as David Cunningham, walked between the two driveways, and then “veered at an angle southeast ... and approached the terrace area by the vehicle.” After the subject entered the passenger side of the vehicle, it began moving, and as it turned right at the corner, Summers noted there appeared to be three males in the car, though he was unable to discern their race. At that point, Summers activated his emergency lights to stop the vehicle. Summers explained:

I decided to stop the vehicle, I thought it was somewhat suspicious the subject was coming from between two driveways and technically from the area of the church; from the way he was walking; that it was occupied by three people, and I had no idea whether or not there [were] more suspects involved other than one on initial dispatch.

¶16 The State acknowledges there were a limited number of specific and articulable facts known to Summers at the time of the stop. Citing *Guzy*, however, the State emphasizes that facts known to the officers did not exist in a vacuum. *Id.* at 678. In *Guzy*, the police were alerted to a robbery committed by a person described as “a white male, 5’5”-5’8”, with dark shoulder length hair and a beard, a slim build, wearing sunglasses and a blue vest with red stripes.” *Id.* at 667. The police received the description at approximately 2:30 a.m., and shortly thereafter, began following a truck that caught their attention because both male occupants had shoulder-length hair. *Id.* The only other articulable fact known to the officers before stopping the vehicle was that the truck could have been used to flee based on the time and distance from the crime scene. *See id.*

¶7 The *Guzy* court concluded that the uniqueness of long hair, coupled with the fact that there were very few vehicles on the road at 2:30 a.m., increased the likelihood that the truck's occupants were involved in the robbery. *Id.* at 681. The court also noted that because the truck was traveling at highway speed at night, the officers had no means of corroborating the physical description short of stopping the vehicle. *Id.* at 682. An additional circumstance in *Guzy* was the officers' concern that they would lose their opportunity to investigate because the truck was within two miles of the Minnesota border. *Id.* Finally, the officers knew that by briefly stopping the truck and getting a closer look at its occupants, they could, with minimum intrusion, quickly corroborate the physical description or ascertain that the occupants did not fit the description. *Id.* Based on those facts and circumstances, the *Guzy* court concluded the officers acted reasonably by stopping the vehicle in order to further investigate. *Id.*

¶8 Here, the State argues that, although the subject entering the vehicle did not match the description of the robbery suspect, "the vehicle was spotted in a location and at a time that would be consistent if the robber had planned to use a vehicle to flee the scene." Further, a woman told the officer she had not seen anyone pass by on the opposite side of the church. Citing *Guzy*, the State argues there were no alternative means of further investigation available short of an actual stop and the opportunity for further investigation might have been lost if Summers did not react immediately. Finally, the State claims that the detailed description of the robbery suspect would have allowed Summers to determine with minimal intrusion whether a person of that description was in the vehicle.<sup>2</sup>

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<sup>2</sup> The State also emphasizes that once the vehicle stopped, one of its passengers, Cunningham, began running from the vehicle. The State claims that Cunningham's flight  
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¶19 We conclude that the facts in the present case are readily distinguishable from those in *Guzy*. In *Guzy*, both suspects matched the description of the robber and the late night/early morning observation of the truck were significant factors in supporting the officers' decision to stop the vehicle. *Id.* at 681. Here, we are not persuaded that the facts and circumstances surrounding the stop were sufficient to give rise to a reasonable, articulable suspicion of criminal activity that would justify the intrusion of an investigatory stop. *See id.* at 675. There was nothing objectively suspicious about what the officer observed before making the stop. Although the vehicle had geographic proximity to the church, the suspect's description as a tall, thin black male wearing glasses did not match that of the white male Summers observed walking to the vehicle, nor was a black male observed in the vehicle before the stop was initiated. Additionally, given the time at which these observations were made, there is nothing inherently suspicious about a person walking down a driveway between two houses to enter a vehicle at the curb of a residential street. The fact that the vehicle contained two or three men was likewise not inherently suspicious. Many people are on their way to work at that hour and it is not unusual to rideshare with others. Moreover, other than a bare description of the suspect, Summers had no information about accomplices or a getaway vehicle. We conclude that at best, Summers acted on what turned out to be nothing more than a successful hunch. An inchoate and unparticularized suspicion or hunch, however, will not suffice. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Because the officer lacked a legal basis for the stop, the subsequent search was unlawful and any resulting evidence should have been

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provided police with additional reasonable suspicion. The fact that Cunningham fled the car once stopped, however, is irrelevant to the initial determination of whether there was reasonable suspicion to initiate the stop.

suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). Accordingly, we reverse the judgments of conviction and remand the matter for further proceedings.<sup>3</sup>

*By the Court.*—Judgments reversed and cause remanded.

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

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<sup>3</sup> Garrett also argues the circuit court erred by denying his motion in limine to exclude certain testimony and evidence at trial. Because the judgments are reversed, we do not address this argument. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

