COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP526-CR **Cir. Ct. No. 2010CF4887**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN ERIK DIGGINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Reversed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Ryan Erik Diggins appeals the judgment of conviction following his guilty plea to being a felon in possession of a firearm. Diggins also appeals the circuit court's order denying his motion to suppress

evidence which he contends was obtained as a result of an illegal stop.[1] We reverse.

BACKGROUND

¶2 On October 1, 2010, Diggins was charged with one count of possession of a firearm by a felon, stemming from his arrest on September 28, 2010. According to the criminal complaint, Diggins was arrested at the 3500 block of West Silver Spring Drive, Milwaukee, after Milwaukee Police Sergeant Joe Roberson recovered a .22 caliber Smith and Wesson semi-automatic weapon from Diggins's coat pocket. At the time of his arrest, Diggins was on probation in Minnesota for felony assault.

¶3 Diggins filed a motion to suppress evidence, arguing that the firearm was recovered as a result of an illegal stop and subsequent search. The circuit court held a hearing on the motion on December 16, 2010. Only Sergeant Roberson testified at the hearing. Roberson stated that on the night of September 28, 2010, he was patrolling the area around the 3500 block of West Silver Spring Drive. Roberson testified that he observed Diggins and a companion with their backs against the wall of a gas station located at the corner of North 35th Street and West Silver Spring Drive. Roberson was driving an unmarked patrol car; he drove about two blocks past Diggins, made a U-turn, and observed Diggins and his companion still in the same location. According to Roberson, neither Diggins nor his companion were drinking, eating or smoking. Roberson never observed

[1] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(10) (2011-12).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

anything in Diggins's hands. Roberson drove past Diggins again and made another U-turn. Diggins and his companion were standing at the gas station for approximately five minutes. Roberson concluded that they were loitering, and called for backup "to assist … in a field interview stop of the subjects." Roberson testified that the gas station is in a "high crime area," and that Diggins was dressed in all black. According to Roberson, "subjects [that] are usually dressed like that … are either committing armed robberies or … dealing drugs." Diggins's companion was dressed in light-colored clothing.

¶4 Roberson testified that he circled the block and as he reapproached the gas station he saw the back-up marked squad car approaching from the west. Roberson stated that Diggins and his companion started walking away from the gas station *before* Roberson saw the marked squad car. Roberson observed Diggins and his companion seated at a bus stop across the street from the gas station. Roberson testified it was his "impression," although he could not testify with certainty, that Diggins actually saw the squad car before crossing the street.

¶5 After Diggins and his companion sat down at the bus stop, Roberson stopped his car in front of the bus stop and exited the car to conduct a field interview of Diggins. The stop was based on Roberson's concern about loitering "to see if [Diggins] was in the area – legally in the area, not committing any crimes or about to commit any crimes." Two additional officers also approached Diggins. When Diggins was sitting at the bus stop, Roberson observed Diggins's hands were held "really tight" in his (Diggins's) coat pockets. Diggins's hands being "pressed down" in his coat pocket, Roberson testified, did not have any significance based on his training and experience. Roberson thought Diggins may have been holding something. Before asking Diggins any questions, Roberson

told Diggins to remove his hands from his pockets. Diggins complied. In the pat-down that followed, Roberson recovered a gun in Diggins's coat pocket.

¶6 The circuit court denied the motion to suppress, stating:

> This is a situation where – This isn't like ten seconds or 30 seconds. This is five minutes. The defendant and his friend are up against a wall of a Citgo station. They're not purchasing anything. They're not purchasing gas. They're not smoking a cigarette. They're not eating something that they purchased in there or drinking something that they purchased in there, and I think a reasonable look at the loitering statute provides for the ability for officers to ask the questions of the defendant and his friend, what are you doing.
>
> And I think it's significant that it is a high crime area and an area where drug dealing and gun crimes occur and specifically at that location. [W]here these things take place to assure that they don't happen again.
>
> Now, had he been there for ten seconds or 30 seconds, been coming out of the door on his way somewhere, certainly there would be no basis for the stop; but five minutes up against the wall with no real obvious purpose for being there, I believe meets the definition in terms of reasonable suspicion for what is really a limited stop. It is a stop to ask questions, a field interview…. But for a limited stop, reasonable suspicion, I believe it's there in terms of loitering based on this record.
>
> Now, did the officers have the ability to pat down the individual that they are talking to prior to asking questions? … [I]t's a minimally invasive seizure of the person, a frisk.
>
> And this officer testified to how minimally it was, which was to pat down for weapons, not to search, not to manipulate clothing….
>
> [G]iven the circumstances of the area, given the fact that the defendant has got his hands in his pockets, even though nothing's seen; and for the officer's safety, I don't think we need to require officers – I don't think we need to hinder them from being able to talk to someone because of their fear of someone pulling out a gun.

> And given that area, given the fact that it's dark and even though it's only 8:30, it's dark. There's more than one individual, even though there's more than one officer; and there is the hands in the pocket that the defendant had in which he could have had something. He was holding his hands close to him. It's not like his hands were out and obvious the whole time.
>
> So I think given all of that, the officer has reasonable suspicion to do the pat down, so I'm gonna deny the motion to suppress.

¶7 Diggins subsequently pled guilty and was sentenced to four years' incarceration, consisting of two years of imprisonment and two years of extended supervision. Diggins, through postconviction counsel, filed a motion for reconsideration. The circuit court denied the motion. This appeal follows.

STANDARD OF REVIEW

¶8 We apply a two-step standard of review in a challenge to a ruling on a motion to suppress. ***State v. Martin***, 2012 WI 96, ¶28, 343 Wis. 2d 278, 816 N.W.2d 270. When reviewing a circuit court's ruling on a motion to suppress evidence, we will uphold the circuit court's factual findings unless they are clearly erroneous. *See* ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. We independently decide, however, whether the facts establish that a particular search or seizure occurred and, if so, whether it violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). Where an unlawful stop occurs, the remedy is to suppress the evidence it produced. *See* ***State v. Washington***, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305; ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

¶9 "The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution." ***State v. Dearborn***, 2010 WI

84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. In ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), the Supreme Court stated that "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." To make a valid investigatory stop, "***Terry*** requires that a police officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Allen***, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999).

¶10 The test we apply to determine whether an officer has reasonable suspicion, described in ***Terry*** and its progeny, is objective:

> Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An inchoate and unparticularized suspicion or hunch ... will not suffice.

State v. Waldner, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citations and quotation marks omitted; brackets and ellipses in ***Waldner***). "Thus, although an officer's subjective belief might color an objective analysis by giving context to an otherwise dry recitation of facts, simple good faith on the part of the arresting officer is not enough because if it were, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." ***State v. Pugh***, 2013 WI App 12, ¶11, 345 Wis. 2d 832, 826 N.W.2d 418 (Ct. App. 2012) (citation and quotation marks omitted).

¶11 It is undisputed here that a stop occurred. While Diggins was seated at the bus stop, Roberson and two other officers pulled up in front of Diggins to conduct a field interview. Diggins argues that he was illegally stopped because there are no facts which support an objectively reasonable suspicion that he was loitering.

A. There was no objectively reasonable suspicion that Diggins was loitering.

¶12 The loitering ordinance is violated: (1) if a person is present at a place, time or manner not usual for law-abiding individuals; and (2) in circumstances that warrant alarm for the safety of persons or property in the vicinity. *See* MILWAUKEE, WIS., CODE OF ORDINANCES § 106-31(1).[2] The ordinance requires a police officer to give the individual an opportunity to identify himself and to explain his presence. However, unless both of the two precipitant

[2] The ordinance provides:

> LOITERING. Loiters or prowls *in a place, at a time,* or in a manner *not usual for law-abiding individuals* under *circumstances that warrant alarm for the safety of persons or property in the vicinity.* Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, *a peace officer shall* prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by *requesting him to identify himself and explain his presence and conduct.* No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

(Emphasis added.)

circumstances are first present, the identification and explanation requirements do not come into play. *See* ***id.***

¶13 Here, the record establishes that no complaints to the police had been made about Diggins's presence at the gas station. There is no evidence that property in the vicinity of Diggins and his companion was in any danger or that any persons in the vicinity had cause for alarm for their safety. It is well-settled law that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000); *see also* ***Washington***, 284 Wis. 2d 456, ¶18.

¶14 Neither the individual facts in this case, nor the totality of those facts—including Roberson's fourteen years of experience as a police officer—support a finding of objectively reasonable suspicion that Diggins was loitering at the gas station. There is no evidence of flight other than Roberson's "impression" that Diggins actually saw the squad car before walking across the street to the bus stop. Indeed, Roberson testified that he saw Diggins walk towards the bus stop *before* Roberson saw the approaching squad car. Conspicuous by its absence from this record is any circuit court finding that Diggins's walk to the bus stop was evidence of flight from the police.

¶15 More than mere presence (*i.e.*, hanging out) in a public place is required for *reasonable* suspicion that criminal activity is afoot. *See* ***Pugh***, 345 Wis. 2d 832, ¶12. Hanging out in a high crime neighborhood for approximately five minutes, at night, while dressed in dark clothing, is not enough for reasonable suspicion. *See* ***State v. Young***, 212 Wis. 2d 417, 429-30, 569 N.W.2d 84 (Ct. App. 1997) (acknowledging that while some seemingly innocent conduct may also

give rise to reasonable suspicion, "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in … neighborhoods where drug trafficking occurs" is insufficient for finding reasonable suspicion of criminal activity). Nor is hanging out at a place where other arrests have been made sometime in the past, without more, enough for reasonable suspicion of a particular person's involvement in criminal activity. ***Washington***, 284 Wis. 2d 456, ¶¶17-18.

¶16 Nothing in the record suggests that Roberson knew Diggins before this encounter. None of Roberson's observations support reasonable suspicion either that Diggins was in a place "not usual for a law abiding individual" or that Diggins's presence at the gas station was cause for "alarm for the safety of persons or property in the vicinity." *See* MILWAUKEE, WIS., CODE OF ORDINANCES § 106-31(1). Roberson opined that he suspected Diggins of loitering based only on Diggins's appearance, not on any activity Roberson observed. If such *ipse dixit* justification is permitted to replace the requirement of "specific and articulable facts" and "rational inferences" therefrom, the law based on ***Terry*** and its progeny will be effectively eviscerated.

¶17 We conclude that on the record before us, standing for five minutes while doing nothing in a place to which the public is invited, while wearing black clothing, and then moving to another equally public place, even in a high crime area, is not a basis for a ***Terry*** stop.

B. There was no objectively reasonable suspicion that Diggins was selling drugs.

¶18 The State also contends that regardless of whether Diggins was loitering, Roberson had reasonable suspicion to suspect that Diggins was dealing drugs.

¶19 The State argues that the combination of the following factors support the circuit court's finding of reasonable suspicion: (1) the stop occurred in a high crime area; (2) Diggins wore dark clothing; (3) the stop occurred after dark; (4) Diggins stood for five minutes at a location without eating, drinking or smoking; (5) Diggins moved away from the gas station when the squad car appeared; and (6) Roberson testified that he has fourteen years of experience as a police officer.

¶20 Roberson's testimony does not support the State's theory. Roberson testified that his decision to stop Diggins was based on his experience in this high crime area, his knowledge of prior arrests at that gas station in which drugs and weapons had been recovered, and "because of … the way [Diggins] was dressed and because it looked like he was loitering in the area with no official, you know – or no business being there." Roberson never testified that he suspected Diggins was selling drugs, or that he observed any actions by Diggins or his companion which made him (Roberson) suspicious that a drug sale was about to or had recently occurred. Rather, Roberson repeatedly explained that he decided to conduct a field interview based on his suspicion that Diggins was loitering. Specifically, Roberson testified that:

> You know, my training and experience at this time I believed they were *loitering.* … I had requested another

> squad over the radio to assist me in a field interview stop of the subjects.
>
> The purpose of the field investigation was to see if the subject was in the area – legally in the area, not committing any crimes or about to commit any crime.
>
> [The black clothing was] not the only thing that raised my suspicion, the fact that he was standing against the wall at the gas station *loitering* in the area.
>
> Q: And were you stopping for *concern about loitering*?
>
> A: That was the reason for the – That was the initial reason for the stop. *That was my probable cause for the stop.*

(Emphasis added.)

¶21 In measuring reasonable suspicion, "[w]e look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." *See* ***Waldner***, 206 Wis. 2d at 58. Here, the evidence upon which the State relies for objectively reasonable suspicion of selling drugs is beyond thin.

¶22 Diggins was observed standing outside of a gas station where Roberson knew arrests had been made in the past, and which he characterized as a high crime area. Roberson agreed that the gas station was also, a "convenient" (sic) store that sold a variety of items besides gasoline. Neither the bus stop nor the gas station is in any way a restricted area. The public may come and go in both places freely, without permission from anyone. Diggins's mere presence for five minutes outside of the gas station does not alone constitute suspicious behavior. *See* ***Washington***, 284 Wis. 2d 456, ¶¶ 17, 18 (A ***Terry*** stop of a man known to the officer from past encounters, at a high crime location, where the man was observed only standing on the sidewalk in front of a house the officer believed

was vacant, was invalid because "[p]eople, even convicted felons, have a right to walk down the street without being subjected to unjustified police stops.").

¶23 As stated, Roberson did not know Diggins prior to this encounter. The facts on the record simply establish that on a night in September, at 8:25 p.m., Diggins wore a dark hat and jacket while standing outside of a gas station, for approximately five minutes, with a companion in lighter clothing before walking across the street to a bus stop. Without more, there was nothing inherently suspicious about Diggins doing nothing more than wearing dark clothes on a September evening. Roberson's extraordinary conclusion that people "dressed like that … are either committing armed robberies or … dealing drugs" is not supported by any facts in the record. Nor does Roberson's general experience as a policeman provide the missing support. An officer's experience, without more, is insufficient to support a finding of objectively reasonable suspicion. *See* ***State v. Eason***, 2001 WI 98, ¶25, 245 Wis. 2d 206, 629 N.W.2d 625.

¶24 Moreover, Roberson did not see *anything* in Diggins's hands, either at the gas station or at the bus stop. The record does not establish that Diggins gave anyone anything, or behaved in a furtive manner while under Roberson's observation.

¶25 We conclude that the evidence is insufficient to support a reasonable suspicion that Diggins was selling drugs.

CONCLUSION

¶26 We conclude that there was no factual basis for objectively reasonable suspicion which would justify the stop. Therefore we must reverse of the judgment. Consequently, we do not separately consider suppression of the gun. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases "on the narrowest possible ground.").

By the Court.—Judgment and order reversed.

Not recommended for publication in the official reports.

¶27 FINE, J. (*concurring*). I join the Majority Opinion, but write to emphasize why this case is important.

¶28 On July 11, 2013, this court granted the State's motion to dismiss the appeal because, according to the State, Ryan Erik Diggins absconded. I dissented. As I wrote in my dissenting memorandum, Diggins's "appeal presents *important issues that transcend Diggins*." (Emphasis in original.) For reasons explained in this court's order issued July 30, 2013, we have granted Diggins's July 18 motion to reconsider.

¶29 With limited exceptions, people have a right in this country to go about their lives, to stand around, to hang out—all without having to submit to police interrogation. *See* ***Terry v. Ohio***, 392 U.S. 1, 21 (1968) (The police may not stop a person unless they have "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an objective reasonable suspicion that the person is doing something or has done something unlawful.).

> Under ***Terry***, courts must assess the following in determining whether a stop is lawful:
>
> - there must be "articulable facts" evident in the Record
> - that "taken together with rational inferences from those facts,"
> - when viewed objectively, permit a law-enforcement officer to "reasonably" "conclude in light of his experience that criminal activity may be afoot."
>
> ***Id.***, 392 U.S. at 21–22, 30.

State v. Matthews, 2011 WI App 92, ¶11, 334 Wis. 2d 455, 462, 799 N.W.2d 911, 914. Mere hanging around, however, is not enough, nor could it be. *See* ***Brown v. Texas***, 443 U.S. 47, 51–52 (1979) (police may not stop a citizen unless the officers have "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"; "'look[ing] suspicious'" in area frequented by drug users not sufficient); ***Papachristou v. City of Jacksonville***, 405 U.S. 156, 169 (1972) ("A direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster.") (footnote omitted). Indeed, as Professor Charles A. Reich has written: "If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight." Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966) (quoted in ***Papachristou***, 405 U.S. at 164 n.6). We must ensure that the law that applies to Professor Reich applies to all, whether they are stargazers or not, and irrespective of where they live.

¶30 In defending what the police did here, the State's appellate brief reveals how thin was the circuit court's justification for upholding the stop:

> The circuit court found that [Milwaukee police] Sergeant [Joe] Roberson saw Diggins and another person with their backs against the wall of a Citgo station ten yards from the door wearing dark clothing. Diggins did not have anything in his hands and therefore, was not smoking, eating, or drinking. Diggins did not move from the location for five minutes. It was a high crime area for both drugs and guns and several arrests had been made at that the [sic] specific Citgo station. Diggins started to walk away around the time that a marked squad arrived for backup and may have moved in response to seeing the squad car.
>
> …
>
> There are several factors that contribute to reasonable suspicion that criminal activity may have been

> afoot: (1) the stop occurred in a high crime area, (2) Diggins wore dark clothing, (3) the stop occurred after dark, (4) Diggins stood for five minutes at a location without eating, drinking, or smoking, (5) when the marked squad car appeared Diggins moved away from the gas station, and (6) Sergeant Joe Roberson's training and experience.

(Record references omitted.) The officer testified that all this took place at about 8:25 in the evening in late September. He told the circuit court that he believed that Diggins and the person with him might have been violating a City of Milwaukee Ordinance against loitering. A person violates the ordinance if he or she:

> Loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object.

MILWAUKEE, WIS., CODE OF ORDINANCE, § 106.31.1.[1] Hanging around in a high-crime area, wearing dark clothing (which either is or was a fashion trend—*see* Ashley Lutz, *Abercrombie Loathes Black So Much That Employees Can't Wear It to Work*, BUSINESS INSIDER (July 8, 2013, 11:38 AM), http://www.businessinsider.com/abercrombie-hates-the-color-black-2013-7), after the sun has set, for five or so minutes before moving on, hardly meets the objective test of "reasonable suspicion" that a crime may be "afoot" that ***Terry*** or even the ordinance demands. *See* ***State v. Washington***, 2005 WI App 123, ¶¶3, 17, 284 Wis. 2d 456, 460, 471, 700 N.W.2d 305, 307, 312 (Seeing a suspect in

[1] The ordinance may be found at: http://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/Volume-1/CH106.pdf (last visited July 23, 2013).

front of vacant house is insufficient reason to stop him even though: (1) the officer knew that the suspect did not live in the area, (2) the suspect had been previously arrested for selling narcotics, and (3) the police had received a complaint that someone was loitering in the area.). Simply put, police had no right to stop Diggins, irrespective of whether he was smoking or eating or drinking as he stood outside on a Fall evening in Milwaukee. Many folks will be out of their homes on a Fall evening, not drinking or smoking, perhaps chatting with a friend, perhaps just walking, perhaps just standing around, perhaps even looking up at the sky to see the stars—*and they have every right to do so without being asked by the police to explain themselves.* *See* ***Terry***, 392 U.S. at 22–23 ("There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs.").

¶31 ***Terry*** noted, of course, that seemingly innocent behavior might under some circumstances trigger an objective reasonable suspicion that the persons are up to no good. ***Id.***, 392 U.S. at 23 (recounting additional things done by those whom the officer in ***Terry*** observed). But the test *is not* what the officer in his or her "experience" might subjectively find suspicious because that would strip the community of its Fourth Amendment protections and would in effect give the police *general warrants* to stop anyone at any time in any place. *See* ***id.***, 392 U.S. at 22 ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.") (cited sources and some quotation marks omitted); 392 U.S. at 37 (The Fourth Amendment was the Founder's reaction to the King's "general warrant, in which the name of the person to be arrested was left blank."). Given that apparent

violations of non-criminal civil-forfeiture laws can support the requisite objective "reasonable suspicion" for a ***Terry*** stop, *see* ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63, 65–66 (Ct. App. 1991) (civil forfeiture sufficient to justify a ***Terry*** stop), and in light of the proliferation of such civil-forfeiture laws and the myriad ways a person can violate them, *see e.g.*, ***State v. Bundy***, No. 1990AP825-CR, unpublished slip op. (WI App Aug. 21, 1990) (omitting a left-turn signal when making a left turn), courts must be extra vigilant to ensure that at least the corners are square and that clear objective evidence supports the stop.[2]

¶32 ***Terry*** also recognized that the exclusionary rule, which we apply here, is powerless to deter those relatively few police officers who stop and frisk persons merely to harass:

> Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to

[2] I am not citing ***State v. Bundy***, No. 1990AP825-CR, unpublished slip op. (WI App Aug. 21, 1990), either as "precedent" or "persuasive authority"—*see* WIS. STAT. RULE 809.23(3); rather, I am taking judicial notice of the decision, *see* WIS. STAT. RULE 902.01(3) (discretionary judicial notice); ***Teacher Retirement System of Texas v. Badger XVI Limited Partnership***, 205 Wis. 2d 532, 540 n.3, 556 N.W.2d 415, 418 n.3 (Ct. App. 1996) (court files are subject to judicial notice) because it is an example of use of a fairly innocuous civil-law violation to justify a ***Terry*** stop. *See* ***Terry v. Ohio***, 392 U.S. 1, 21 (1968).

The square-corners concept comes from ***Rock Island, Arkansas & Louisiana Railroad Co. v. United States***, 254 U.S. 141, 143 (1920) (People "must turn square corners when they deal with the [g]overnment.") (Holmes, J.). In our age, when so much of what people do is regulated by government, both state and federal, the onus is also on "government" in all its forms, especially as it affects the criminal-justice system, to turn "square corners" with our people. Indeed, Congressman F. James Sensenbrenner, Jr., former chairman of The House of Representatives Judiciary Committee and the current chairman of the Crime, Terrorism, Homeland Security and Oversight Subcommittee, noted on May 7, 2013, that: "Today, there are roughly 4,500 federal crimes on the books. And still many more regulations and rules that, if not abided by, result in criminal penalties, including incarceration. Many of these laws impose criminal penalties – often felony penalties – for violations of federal regulations." http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=332833 (last visited July 23, 2013). *See also* ***United States v. Costello***, 666 F.3d 1040, 1047 (7th Cir. 2012) ("The Justice Department does little to publicize the existence of federal criminal prohibitions, numerous as they are—there are more than 4000 separate federal crimes, as well as countless regulations the violation of which is criminal.").

> prosecute for crime. Doubtless some police 'field interrogation' conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.
>
> Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

Terry, 392 U.S. at 13–15 (footnotes omitted).[3] *See also* Ta-Nehisis Coates, *The Dubious Math Behind Stop and Frisk*, THE ATLANTIC (July 24, 2013, 3:20

[3] One of the ***Terry*** footnotes is especially enlightening in connection with the problem ***Terry*** recognized. I reprint it here, with the observation that unfortunately little has changed since the study:

> The President's Commission on Law Enforcement and Administration of Justice found that '(i)n many communities, field interrogations are a major source of friction between the police and minority groups.' *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* 183 (1967). It was reported that the friction caused by '(m)isuse of field interrogations' increases 'as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.' ***Id.***, at 184. While the frequency with which 'frisking' forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, *see* Tiffany, McIntyre & Rotenberg, supra, n. 9, at 47–48, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating

PM), http://www.theatlantic.com/national/archive/2013/07/the-dubious-math-behind-stop-and-frisk/278065. Of course, these "field interrogations" are seen by many as things that happen to other people, and this reminds me of Solzhenitsyn's observation: "The majority sit quietly and dare to hope. Since you aren't guilty, then how can they arrest you?" ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO 1918–1956: AN EXPERIMENT IN LITERARY INVESTIGATION 10 (translated by Thomas P. Whitney and Harry Willetts) (Harper Perennial Modern Classics 2007). A recent federal-court opinion starkly states the issue that underlies this appeal:

> In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.

United States v. Black, 707 F.3d 531, 542 (4th Cir. 2013). I agree. Thus, I join the Majority opinion reversing the circuit court's denial of Diggins's suppression motion.[4]

> anyone who attempts to undermine police control of the streets.' ***Ibid***.

Terry, 392 U.S. at 14 n.11.

[4] Accordingly, we do not have to consider, and the Majority opinion does not, whether once having stopped Diggins, the police were free to search him. *See* ***State v. Morgan*** 197 Wis. 2d 200, 217, 539 N.W.2d 887, 894 (1995) ("[H]indsight cannot constitutionally be employed to justify a pat-down.") (Geske, J., concurring on behalf of six justices); 197 Wis. 2d at 223, 539 N.W.2d at 897 (Fruits of the search cannot justify the initial stop.) (Abrahamson, J., dissenting).