COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 97-1532-CR
97-1887-CR

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

NO. 97-1532-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT

V.

TERRY H. REDMOND,

DEFENDANT-RESPONDENT.

NO. 97-1887-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STANLEY EGERSON,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

BROWN, J. The State appeals orders suppressing evidence derived from automobile searches following a ***Terry***[1] stop in two cases. The State maintains that the searches in both cases were justified because in each instance the officer conducting the search reasonably suspected that the police were in danger of physical injury. We agree with the trial court, however, that the officer was not so justified, and we affirm both orders.

Both searches have a common origin. Tavares Martin was shot on June 15, 1996, at approximately 10:00 p.m. Martin was taken to a hospital and pronounced dead. At the hospital, Sergeant William H. King was the supervisor working the homicide and talked to several eyewitnesses who had gathered to learn Martin's fate. The sketchy information received included the shooter's street name, "Mousha," and that he had fled the scene in a 1970's model blue convertible with a white top. Around midnight, further investigation by King yielded the information that "Mousha's" real name was Ysef Gibbs and that there was a another man with Gibbs at the time of the shooting with the street name of "Triple 6." "Triple 6" was subsequently identified as Michael Mackey. Also at this time, King was given the street names of other individuals who Gibbs "could be with."

Officers were informed to be on the lookout for an older model blue convertible. On June 16, shortly after midnight, an officer stopped an older model

[1] *See* ***Terry v. Ohio,*** 392 U.S. 1 (1968).

dark blue 1972 Chevrolet convertible with the top down. The officer testified that he stopped the vehicle for the purpose of identifying the occupants. Four black males were the occupants. The officer told the occupants to keep their hands up so he could see them. Then other police officers arrived. Upon their arrival, the occupants were ordered to exit the vehicle. They were asked their names and were patted-down. Terry H. Redmond was identified as one of the passengers in the car. All of the individuals were "very cooperative." As supervisor, King was present at the scene. He conducted a search of the automobile for "officer safety purposes." The search yielded concealed weapons. Redmond was charged with carrying a concealed weapon.

Based on a bulletin to be on the lookout for a convertible fitting the description of the get-away vehicle, a separate search occurred at around 3:50 a.m., almost six hours following the murder. By this time, King had received a description of Gibbs from Gibbs' girlfriend. Gibbs was described as a black male, approximately six feet tall, with a high top fade haircut. This information had been relayed by dispatchers to the officers on patrol. Stanley Egerson's vehicle was stopped because it fit the description of the vehicle possibly used by Gibbs to flee the murder scene. Three black males were in the car. The stop was treated as a "felony stop." That means that guns were drawn and each individual in the car was given a set of instructions on how to get out of the car, one at a time. After each person was out of the car, they were ordered to raise their hands, make a 360-degree circle so that a full view of each person could be seen for weapons and then were ordered to back themselves up until commanded to stop. At this point, an officer placed handcuffs on each person for the officer's safety. All three men were cooperative. Before any questioning of the occupants, a search of the car

was conducted by King. The search turned up a loaded .25-caliber gun under the armrest. Egerson was charged with carrying a concealed weapon.

The record does not indicate that either Redmond or Egerson was involved in the murder. Thus, the issue is only whether the evidence collected from the two cars can be used in the carrying concealed weapons charges brought against the two men. Our supreme court has held that officers are permitted to search a vehicle for weapons during a ***Terry*** stop when the officer "reasonably suspects that he or another is in danger of physical injury." ***State v. Moretto***, 144 Wis.2d 171, 174, 423 N.W.2d 841, 842 (1988). The ***Moretto*** decision rested in part upon the United States Supreme Court decision in ***Michigan v. Long***, 463 U.S. 1032, 1050-52 (1983), where the high court reasoned: "If a suspect is 'dangerous,' he is no less dangerous simply because he is not arrested.... [A] ***Terry*** suspect ... [may] break away from police control and retrieve a weapon from an automobile. In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside."

However, the ***Moretto*** court did not interpret ***Long*** to mean that officers have "carte blanche" authority to search for weapons during a ***Terry*** stop simply because the *officer* deems it reasonable to do so for protection's sake. Rather, the court cited ***Long*** for the proposition that the issue is "whether a reasonably prudent man under the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Moretto***, 144 Wis.2d at 184, 423 N.W.2d at 846 (citing ***Long,*** 463 U.S. at 1050). It is for the courts to decide whether a reasonably prudent person, "under the circumstances," would believe that the safety of a law enforcement officer was in danger. The question of reasonableness in a search and seizure setting is an issue of constitutional fact.

See ***State v. Turner,*** 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987). As such, our review is de novo. *See* ***id.*** However, we value and take particular note of the decisions of our trial courts, particularly where the court has provided a very thorough and well-reasoned decision. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475-76, 507 N.W.2d 163, 165 (Ct. App. 1993).

The State centers on the fear first expressed in ***Long*** that a person under detention might break away and retrieve a gun from the car or, after release, might go to the car, get a gun and exact revenge upon the officer. We agree that this is not an unwarranted apprehension on the part of law officers. However, as we have just said, a search of an automobile cannot be justified simply on the basis that the possibility of danger is always present in these situations; rather, the fear must be reasonable and must depend on a case-by-case analysis of the facts. While officers of the law may well believe that, actually being at the scene, they—not judges—are in the best position to know whether a search is justified, the law nonetheless makes it the responsibility of the courts to review the decisions made by the officers in the field.

A review of the cases cited by the State in support of reversal shows why, in those cases, it was deemed reasonable to search the automobile even though the individuals were out of the car and had no immediate access to a weapon. In ***United States v. Holifield***, 956 F.2d 665, 666 (7th Cir. 1992), two Milwaukee police officers saw Holifield exit a tavern, get into a car and pull away from the curb. The car proceeded at a high rate of speed and was driven in a reckless manner. When the officers pulled Holifield over for speeding, and before the officers had even exited their car, Holifield exited his car and approached the officers' squad in a boisterous, aggressive manner. *See* ***id.*** at 666. Fearing for their safety, the officers searched Holifield's vehicle even after Holifield was away

from his car, after he had been patted-down and even though he cooperated with the pat-down and produced his driver's license on demand. *See* ***id.*** at 666-67. The court of appeals upheld the search of the car which produced a concealed weapon on grounds that the officers anticipated that Holifield and his companions would return to their car and wait while the officers wrote the citation. *See* ***id.*** at 668-69. The court obviously believed that because of the circumstances revealing Holifield's aggressive behavior toward the officers, the officers reasonably feared for their safety should Holifield be allowed to return to his car without searching the car first. *See* ***id.***

The State draws a parallel to these two cases because both Redmond and Egerson would have been able to return to their vehicles and have immediate access to their weapons if police had not searched their vehicles after the stop. But that case is not, in fact, parallel to the two cases before this court. Holifield acted aggressively toward the officers. This, coupled with Holifield's reckless and aggressive driving behavior, would justify a reasonable person in the position of the police officers to believe that Holifield and his companions were in an excitable state and might act out. It was a potentially explosive situation that the officers were justified in defusing. We do not have nearly the same circumstances here. There is no indication that either of the two defendants or their companions were in any way inflamed by the stop.

The State also relies upon ***Moretto***. But there, the officers followed up on a complaint that Moretto was threatening a citizen with battery. *See* ***Moretto***, 144 Wis.2d at 174, 423 N.W.2d at 842. The citizen explained that Moretto was known to carry a gun or a knife. The citizen described Moretto's vehicle, and as the officers were leaving the citizen's home, they observed a car answering the description drive by. *See* ***id.*** at 175, 423 N.W.2d at 842. The

officers stopped the vehicle. The occupants of the vehicle were ordered out and a pat-down took place. The officer then used a flashlight to illuminate the driver's seat and saw an unsheathed knife. *See* ***id.*** Moretto acknowledged that the knife was his and he was arrested for carrying a concealed weapon. *See* ***id.*** Our supreme court upheld the search. It reasoned that since the officer had just spoken to the citizen about how Moretto was probably armed, and then came upon Moretto almost immediately thereafter, the officer had every right to believe in the reliability of the citizen's information, including that Moretto had a weapon on his person. *See* ***id.*** at 185, 423 N.W.2d at 846-47. Given that information, the officer could not just let Moretto go; "a 'reasonably prudent person' would be warranted in the belief that Moretto was potentially dangerous and, therefore, … [the officer] did not act unreasonably in taking preventative measures to ensure that there were no other weapons within Moretto's reach before permitting him to re-enter his vehicle." ***Id.*** at 187, 423 N.W.2d at 847.

Just as ***Holifield*** provided no parallel to the two cases before us, neither does ***Moretto***. The officers knew that Moretto *was* the man who was the subject of the investigation. Here, King knew, before searching the car, that Redmond was *not* the subject of the murder investigation, nor was he involved. And, King did not even bother to find out whether Egerson was somehow involved in the murder investigation before searching Egerson's car. In short, there was a nexus between the information about Moretto being armed and dangerous given by the citizen informant and the person the officers stopped. The person stopped was Moretto. In the cases at bar, the information given to the police was that Gibbs and his companions were armed and dangerous. But the persons stopped had nothing to do with that information other than that they were the same race as Gibbs and the cars were similar. ***Moretto*** is distinguishable.

Finally, we comment on the State's argument which is based upon the six-factor test laid out in ***State v. Guzy***, 139 Wis.2d 663, 407 N.W.2d 548 (1987). In that case, our supreme court adopted Professor LaFave's test for determining when an officer may reasonably search an automobile even though the occupants are not near the vehicle. Those factors are: the particularity of the description of the offender or vehicle in which he or she fled, the size of the area in which the offender might be found, the number of persons in the area, the known or probable direction of flight, the observed activity by the particular person stopped and the knowledge or suspicion that the vehicle stopped has been involved in other criminality of the type under investigation. *See* ***id.*** at 676-77, 407 N.W.2d at 554. The State argues that the vehicle is similar in description and such a vehicle is not commonplace, the race of the person sought and the persons stopped is the same, Racine is a small enough city that persons can drive around easily, there was more than one person with Gibbs, and the vehicle in which Redmond was traveling had no license plates. The State argues that these facts satisfy the ***Guzy*** criteria.

Guzy does not help the State here. While it is true that the description of the get-away vehicle was similar to both of the stopped vehicles, all of the rest of the criteria are either irrelevant or point in favor of the defendants. For example, the size of the area—Racine—does not either help or hurt an officer's assessment of reasonableness in these cases. The "number of persons about in the area" is also an irrelevant factor. There was no known "probable direction of flight," so that is an irrelevant factor. The "observed activity of the person stopped" is relevant, but based on our discussion about the ***Holifield*** case, this factor would work in favor of the defendants. As for the "suspicion that the person stopped has been involved in other criminality of the type presently under

investigation," there is no record that anyone who was stopped was associated with the murderous activity being investigated. That factor is irrelevant. And as for the lack of license plates, that is completely irrelevant since the officer testified that the car Redmond was in was stopped because it answered the description of the get-away vehicle, not because there were no license plates. We reject the State's reliance on the ***Guzy*** factors.

The trial court said it best. Regarding the car that Redmond was in, the trial court said:

> The defendant and his passengers did not, as based upon the testimony in this record, do anything to raise the officers' suspicions to permit a search of the vehicle. There is no question that there were good reasons to stop the vehicle and identify the passengers; however ... there is no reason to believe, but for hindsight, that there were weapons in the vehicle and the officers were in danger as now argued by the State.

Regarding Egerson, the trial court wrote:

> [A]t the time the search of the vehicle was conducted, the officers had failed to identify by inquiry or any other method the names of the occupants of the vehicle; had failed to closely compare the description of the target of their search with the occupants of the vehicle, and they had completely controlled the scene by the stopping and temporary detention of the vehicle's occupants in the manner described….

We close by restating what we said above. Not every stop justifies a police officer to search a car. While we can understand that a car which answers a general and unspecific description of a get-away vehicle in which a murder took place might contain weapons, that alone is not enough. There must be some nexus shown between the persons stopped and the reason for stopping the car. Or there must be behavior exhibited at the stop which justifies a fear for safety. Neither is present.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.