

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2014

Diane M. Fremgen
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. 2014AP501-CR

Cir. Ct. No. 2012CF1368

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRELL D. COBBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Terrell D. Cobbs appeals from his judgment of conviction for possession of tetrahydrocannabinols (THC), in violation of WIS.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

STAT. § 961.41(3g)(e). Cobbs and two companions were stopped late one night after a reported armed robbery in the area, and in the pat-down search the officer discovered, opened, and searched Cobbs' cigarette box. The officer found marijuana in the box, and Cobbs was arrested. Cobbs moved to suppress the evidence, challenging the stop and the search of the cigarette box. After the trial court denied his motion, Cobbs pled guilty to possession of THC. He now appeals.

¶2 City of Racine police officers testified at the suppression hearing about what happened the night of November 7, 2012, when Cobbs was arrested. Officer Justin Schmidt-Quist testified that he was on patrol when a robbery call came out over dispatch, which he believed mentioned a weapon, and which indicated that police should start looking in the area for three black males, one six feet two inches or taller, headed westbound from Tenth and Grand Avenues. Schmidt-Quist was in the area, so he started looking for people who matched that description. He saw two men and a woman, racially consistent with the description, walking westbound near the corner of Eleventh and Racine and noticed that one of the men was considerably taller than his two companions. Schmidt-Quist radioed in that he was stepping out of his vehicle with possible suspects. Around this same time a dispatch went out that there were four suspects and that one was wearing a black hoodie and gray sweatpants. While Schmidt-Quist was turning his vehicle around, Officer Eric Fanning arrived at the scene, got out of his car and asked the people to stop. One of them kept walking. Fanning asked at least two more times for the man to stop, but he did not. Fanning started to jog after the man to detain him. At that point Officer Shortess arrived in his squad car and was accelerating to catch up to the fleeing man. He tried to brake and come to a complete stop, but he struck the man with the vehicle. The

man got back up and kept running, but was ultimately tased and taken into custody.

¶3 Meanwhile, Officer James Pettis arrived on the scene and directed his attention to the two people remaining. Pettis proceeded to do a pat-down search for weapons, as the dispatch report had indicated that the suspect was armed. Pettis placed Cobbs' hands behind his back and "patted down his waistband area, his jacket area, as well as anything inside of his pockets." In Cobbs' right front jacket pocket, Pettis felt a firm, heavy item he thought was the trigger guard to a gun. He put Cobbs in handcuffs and removed the item, which turned out to be a large padlock with a shoelace wrapped around the bent portion. Pettis considered this to be a weapon and continued to search Cobbs for additional weapons. He was "feeling around in his pockets" and "pulling things out of his pockets" when he found a packet of cigarettes. Pettis opened this cigarette box as part of the search for "weapons and/or contraband." When asked at the hearing if he knew of weapons that could fit inside a cigarette box, Pettis responded that he did, giving small firearms and hypodermic needles as examples. Pettis found what he believed to be marijuana in the cigarette box and arrested Cobbs.

¶4 The trial court denied Cobbs' motion to suppress. The court noted that Pettis located a weapon on Cobbs, the padlock on a string. After finding one weapon on Cobbs, "[i]t was not out of line to continue to determine whether or not any other weapons existed." The trial court found that the cigarette box could, in fact, hide other weapons, such as a razor blade or a small knife. Thus, it was not unreasonable to open the cigarette box to check for weapons.

¶5 Cobbs challenges the trial court's denial of his motion to suppress on two grounds. First, Cobbs contends that the officers did not have reasonable

suspicion to stop him. Second, Cobbs argues that the search of his person exceeded what is permitted by law when the officer removed his cigarette box and searched inside of it.

Standard of Review

¶6 For both the stop and the search, our standard of review is mixed. Whether there was reasonable suspicion to conduct a stop or search is a question of constitutional fact, to which we apply a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634 (search); *State v. Limon*, 2008 WI App 77, ¶12, 312 Wis. 2d 174, 751 N.W.2d 877 (stop and search). First, we review the trial court’s findings of historical fact under the clearly erroneous standard. *Post*, 301 Wis. 2d 1, ¶8; *Limon*, 312 Wis. 2d 174, ¶12. Second, we review de novo the application of those historical facts to the constitutional principles. *Post*, 301 Wis. 2d 1, ¶8; *Limon*, 312 Wis. 2d 174, ¶12.

Reasonable Suspicion for Stop

¶7 A police officer may temporarily detain an individual to investigate possible criminal behavior when the officer has reasonable suspicion that the individual has committed or is about to commit a crime. WIS. STAT. § 968.24; *Post*, 301 Wis. 2d 1, ¶13. The detention is a seizure within the meaning of the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution and triggers their protections. See *State v. Harris*, 206 Wis. 2d 243, 253, 256, 557 N.W.2d 245 (1996). For an investigatory stop to be constitutionally valid, the officer’s suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion” on the citizen’s liberty. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). What constitutes reasonable suspicion in a given situation depends

on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶¶37-38. There need not be a violation of the law to support an investigative stop. *State v. Anagnos*, 2012 WI 64, ¶47, 341 Wis. 2d 576, 815 N.W.2d 675. Further, police officers are not required to rule out innocent behavior before initiating a stop. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶8 Here, the facts tell us that, under the totality of the circumstances, the officers had reasonable suspicion that Cobbs had committed a crime. Within four minutes of receiving information from dispatch that there had been a robbery in the area, Schmidt-Quist saw three individuals walking in the same direction that the suspects had been seen walking. The individuals were racially consistent with what dispatch had indicated. One of the individuals was significantly taller than the others, a fact that also matched the information from dispatch. When Fanning stopped his squad car to talk to the three people, one fled, raising suspicions about the possibility that the three had something to do with the armed robbery. Fanning noted that the three were the only people he had seen walking in the area; it was about 10:45 p.m. From Fanning's distance, the people appeared to be three black males, just as the dispatch note had described. While the description of the suspects given by dispatch did not precisely match the three individuals stopped, including the reference to the black hoodie and gray sweatpants,² the number of people matched the initial dispatch, they were of the same race as indicated in the dispatch, one was significantly taller than the others and they were the only people out and about in the area almost immediately after the reported robbery. One of

² None of the suspects stopped was wearing a black hoodie or gray sweatpants. One man wore black jeans and a brown hoodie or tan jacket, the woman was wearing blue jeans and a letterman style jacket, and Cobbs wore a dark coat, "probably" black, and black denim jeans.

the three fled at the initial stop, giving greater cause for suspicion for the officers who confronted the remaining two.

¶9 This freeze of a fluid and uncertain situation is just what is envisioned by WIS. STAT. § 968.24 and *Terry*. The officers testified that they were getting new bits of information trickling in over the dispatch radio but that the whole scene was moving “lightning fast.” In their sweep of the area, the officers saw no one except this group of three. Then when an officer stopped to talk to the group, one person fled. The officers had to act to freeze the situation so that they could investigate whether the remaining pair had been involved in, or had witnessed, the recent armed robbery. It would have been unreasonable for the officers to ignore these individuals just because they did not match the dispatch description exactly. This was a justified *Terry* stop.

Reasonable Suspicion for Search

¶10 WISCONSIN STAT. § 968.25 allows an officer who has made a *Terry* stop to conduct a pat-down search for weapons if he or she reasonably suspects that he or she is in danger of physical injury. In reviewing whether such a search was justified, we look at all the facts known to the officer at the time of the search and ask whether they would “warrant a [person] of reasonable caution in the belief that the action taken was appropriate.” *Limon*, 312 Wis. 2d 174, ¶28 (citations omitted; alteration in original).

¶11 Cobbs argues that the extension of the search into his cigarette box was beyond the scope of an intrusion reasonably designed to discover instruments which could be used to assault the police officer. *See Terry*, 392 U.S. at 29. Cobbs points out that the officer testified that he was searching for weapons and/or contraband, thus demonstrating that the scope of the search was broader than a

weapons pat-down. Furthermore, argues Cobbs, at the time his cigarette box was searched he was in handcuffs, and thus it was unlikely he would have been able to access anything in the cigarette box.

¶12 Under the totality of the circumstances, it was reasonable for Pettis to open Cobbs' cigarette box to check for weapons. Pettis was looking for suspects of an armed robbery. He had already found an unconventional weapon on Cobbs. Pettis was aware of weapons that could be concealed in a container the size of a cigarette box. Pettis testified that he thought there might be a weapon inside the cigarette box. Regarding Cobbs' argument that Cobbs was in handcuffs, ultimately Pettis would have had to return the cigarette box to Cobbs, so an inspection to check for weapons was necessary for Pettis's safety. See *Limon*, 312 Wis. 2d 174, ¶¶9, 40 (upholding conviction after officers searched suspect's purse for weapons and found cocaine); see also *Vaughan v. State*, 631 S.E.2d 497, 498, 500 (Ga. Ct. App. 2006) (officers justified in searching small tin for weapons when they had already found other weapons on suspect); *Davis v. State*, 501 S.E.2d 241, 243-44 (Ga. Ct. App. 1998) (search of cigarette box upheld where officers were concerned that "box could contain a razor blade, needle, or other small weapon"); *People v. Salvator*, 602 N.E.2d 953, 965 (Ill. App. Ct. 1992) (officer justified in removing flip-top box and examining contents where he testified about his fear that item might be a weapon); *Stoker v. State*, 170 S.W.3d 807, 813 (Tex. Ct. App. 2005) (search of cigarette box upheld where officer had found a small knife inside a cigarette box during a previous unrelated search).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

