

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-1794-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REGINOLD B. TRUSSELL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Racine County:
EMILY S. MUELLER, Judge. *Reversed.*

¶1 ANDERSON, J. Reginold B. Trussell appeals from judgments of conviction for possession of cocaine and drug paraphernalia as a habitual criminal contrary to §§ 939.62, 961.41(3g)(c) and 961.573(1), STATS. Trussell claims that the trial court erred in denying his motion to suppress evidence because the officer: (1) lacked the reasonable suspicion required by the Fourth Amendment to

justify the stop; (2) lacked the reasonable suspicion required to justify a pat down for weapons; and (3) regardless of the initial legality of the pat down, exceeded the constitutionally permissible scope of the pat down for weapons. We agree with the first contention and, as a result, find it unnecessary to address the final two. We therefore reverse.

¶2 At 10:25 p.m. on November 4, 1998, an anonymous caller telephoned the Town of Mt. Pleasant Police Department. The caller told the dispatcher that she believed a robbery was in progress. The following information was conveyed in the 911 call:

CALLER: Yes, um, there's a place that's called Pet Corner Store and ... there's three guys hanging around, two standing on the corner looking out and it looks like one is trying to break in.

....

DISPATCHER: And there's 3 men hanging around the outside

CALLER: 2 hanging around by, by probably a telephone post ... and the [other] guy is by the door

DISPATCHER: okay

CALLER: by the store door

DISPATCHER: and you feel they are trying to break in

CALLER: yeah, I drove around twice

DISPATCHER: okay, do you want to leave your name?

CALLER: no, just as long as the guy knows the owner

....

DISPATCHER: I'll get somebody over there

¶3 The dispatcher immediately requested that an officer contact headquarters. Next, the dispatcher relayed the following information to the responding officer:

DISPATCHER: Squads please head over to Pet Corner which is on Racine Street, 2200 block

OFFICER: 10-4

....

OFFICER: did the complainant advise how many parties were out there

DISPATCHER: three, two in front, one in the back, all male, all black

¶4 Officer Christopher Paulson responded to the dispatch. Upon arriving at the pet store, he observed three males standing near the building. When he approached, the men asked why Paulson wanted to speak with them. Paulson informed them that a burglary might be in progress and noted that the men appeared to be nervous. Next, Paulson conducted a pat-down search of the men, looking for weapons. As Paulson ran his hands down Trussell's jacket, he felt a "long hard metal object." Unsure of what the object was, Paulson removed it from Trussell's jacket. It was a crack pipe. Trussell was subsequently taken into custody.

¶5 After being charged with possession of cocaine and drug paraphernalia,¹ Trussell moved the court to suppress the evidence, arguing that the evidence was seized as a result of an illegal stop, pat down and subsequent jail search. The motion was denied, and Trussell pled no contest to the charges. Trussell appeals.

¶6 Trussell argues that Paulson lacked reasonable suspicion to temporarily detain him because the anonymous tip upon which Paulson relied was

¹ After being arrested for possession of drug paraphernalia, Trussell was taken into custody. During the search of his person for his booking into the county jail, a baggy containing cocaine was found. Trussell was then charged with possession of cocaine.

unreliable. We agree, concluding that Paulson did not have a reasonable suspicion to stop Trussell.

¶7 When reviewing a trial court's denial of a suppression motion, an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). Whether a search or seizure pass statutory and constitutional standards, however, is a question of law which this court reviews de novo. *See id.* at 137-38, 456 N.W.2d at 833.

¶8 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. Although it has been held that an investigative stop is a "seizure" under the Fourth Amendment, a police officer may, under appropriate circumstances, conduct an investigative stop when a lesser degree of suspicion exists. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968). The standard required for this exception is reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Section 968.24, STATS., the codification of *Terry* in Wisconsin, allows investigative stops based upon a standard of reasonableness.

¶9 A determination of reasonableness depends upon the totality of the circumstances and looks to whether the "facts available to the officer at the moment of the seizure ... 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate." *Richardson*, 156 Wis.2d at 139, 456 N.W.2d at 834 (quoting *Terry*, 392 U.S. at 21-22). Information received from an anonymous informant may provide police officers a basis for reasonable

suspicion. *See Alabama v. White*, 496 U.S. 325, 332 (1990). When evaluating reasonable suspicion, the reliability of an anonymous tip will be measured based upon consideration of the totality of the circumstances. *See id.* at 330.

¶10 In *Richardson*, the court concluded that an anonymous tip and the verification of its innocent details provided the police reasonable suspicion to conduct an investigative stop. *See Richardson*, 156 Wis.2d at 144, 456 N.W.2d at 836. The court stated that the “corroborated actions of the suspect ... need not be inherently suspicious or criminal in and of themselves. Rather, the cumulative detail, along with reasonable inferences and deductions which a reasonable officer could glean therefrom, is sufficient to supply the reasonable suspicion that crime is afoot and to justify the stop.” *Id.* at 142, 456 N.W.2d at 835.

¶11 The *Richardson* court identified two principles that courts are to consider in assessing the reliability of an anonymous tip. First, “the greater the amount, specificity and uniqueness of the detail contained in an anonymous tip, the more likely it is that the informant has an adequate basis of knowledge.” *Id.* Verification of the future predictions of the suspect’s behavior is important “to avoid investigative stops based on minimal facts that any passerby or resident on the street could enunciate” but is not absolutely necessary. *Id.* at 142, 456 N.W.2d at 836.

¶12 Under the second principle, when significant portions of an anonymous tip are corroborated by the police, an inference arises that the anonymous caller is truthful and that he or she is “more probably than not correct as to the ultimate fact of criminal activity.” *Id.* at 142-43, 456 N.W.2d at 836.

¶13 If an anonymous tip provides the police with information concerning ongoing criminal activity that a tipster is observing at the time he or she makes the

call, the tip may be just as certain as when a tip contains a prediction of an individual's future activity. *See State v. Williams*, 225 Wis.2d 159, 174, 591 N.W.2d 823, 830 (1999). In such cases, an officer may corroborate the tip by establishing that the tip meets the critical factors of "veracity," "reliability" and "basis of knowledge."

¶14 We now turn to the factors of "reliability," "basis of knowledge" and "veracity." "Reliability" looks to police corroboration of the details of the tip. If the innocent details are found to be accurate, an inference of reliability arises with respect to information about the criminal activity as well. *See id.*

¶15 In this case, we are presented with a curious twist to the issue of whether an anonymous tipster's information was reliable. What if the dispatcher erroneously conveys the anonymous tipster's information to the officer?

¶16 Here, the dispatcher, while describing the anonymous tip, relayed extraneous facts to the officer that were not provided by the tipster. The dispatcher informed Paulson that the anonymous tipster described the individuals at the crime scene as "three [people], two in front, one in the back, all male, all black." The information the dispatcher conveyed to the officer was inconsistent with what the caller had said. First, the caller never indicated the position of the men at the store. She never said they were at the "front" or "back" of the store. She stated that there were "two [men] standing on the corner looking out and it looks like one is trying to break in [the store door]." Because the transcript of the 911 call does not contain these details, it appears that the dispatcher derived these facts independently.

¶17 The second and more important inconsistency between the information the tipster gave the dispatcher and what was eventually conveyed to

the officer is the race of the men outside the pet store. In the transcript of the 911 call, the caller never mentions the suspects' race. However, moments later, the dispatcher tells Paulson the suspects are "all male, all black."

¶18 "[I]n assessing whether officers had the requisite reasonable suspicion, we must consider not only the tip, but also the circumstances in which the tip was received, and with that in mind balance the privacy interest of [Trussell] against the need to protect society." *Id.* at 178, 591 N.W.2d at 832.

¶19 We determine that the reliability of the anonymous tip was jeopardized by the extraneous details the dispatcher added when relaying the tip to the officer. When investigating a report from an anonymous tipster, the officer is seeking to verify the facts—the officer needs to ascertain whether criminal activity is really afoot or if the tip is only the work of a prankster. Each fact is important. With each fact that the officer can verify, the reliability and veracity of the tip increases, as does the officer's reasonable suspicion that criminal activity is taken or has taken place. It is the culmination of these details that creates a reasonable suspicion to justify stopping an individual.

¶20 Not every inconsistency between a tipster's actual words and the words conveyed to the officer by the dispatcher would jeopardize a tip's reliability. For example, in this case, the dispatcher told the officer the suspects' positions at the store. This standing alone may not deem the tip unreliable, but here, the dispatcher also included extraneous information regarding the suspects' race. Despite the fact that in this instance the extraneous information turned out to be accurate, in other instances it may not. The inclusion of extraneous information impacts the quality of the anonymous tip. Because of the circumstances in which the officer received the anonymous tip, we determine that the tip was unreliable.

¶21 However, this does not end our inquiry. We now examine whether the officer, independent of the anonymous tip, had sufficient specific and articulable facts or inferences to support reasonable suspicion to stop.

¶22 At the suppression hearing, the officer acknowledged that when he arrived at the pet store, he saw three men standing on the side of the building talking to each other. He admitted that they were not behaving like “lookouts.” They were just standing around and talking. The men asked the officer why he wanted to speak with them. The officer informed them that he had been advised that a burglary was in progress at the store, noting that the men appeared nervous. The officer next asked Trussell to raise his hands for a pat down.

¶23 We determine that these facts are insufficient to justify reasonable suspicion that criminal activity was or had been taking place. The officer only observed innocent behavior—a couple of people standing around and talking on a city street. As a result, Trussell’s detainment was unreasonable. Because the initial investigative stop of Trussell was unreasonable, we also find the subsequent pat-down search was unreasonable. The evidence seized as a result of that unlawful stop and pat-down search must be suppressed. In addition, the evidence obtained during the search incident to arrest should be suppressed as “fruit of the poisonous tree.” *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). It follows that the resultant convictions in this case must be reversed.

By the Court.—Judgments reversed.

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