

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2017

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. 2016AP1912-CR

Cir. Ct. No. 2014CM3393

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARCELLOUS D. TALLY-CLAYBORNE,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County:
PAUL J. RIFELJ, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Marcellous D. Tally-Clayborne appeals the judgment of conviction, entered upon a jury verdict, of one count of carrying a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

concealed weapon. He contends that the trial court erred in denying his motion to suppress evidence. We affirm.

BACKGROUND

¶2 On August 20, 2014, Tally-Clayborne was charged with one count of carrying a concealed weapon. According to the criminal complaint, on August 18, 2014, Milwaukee Police Officers Sean Mahnke and Mark Dillman heard two gunshots in the area of 2nd and Ring Streets. The officers drove in that direction and found Tally-Clayborne and two other individuals in the area. The officers started to conduct pat-downs of the other two individuals but noticed Tally-Clayborne start to walk away and reach under his waistband. Dillman then tried to conduct a pat-down of Tally-Clayborne. When Dillman lifted Tally-Clayborne's arms, Dillman heard the sound of metal hitting the floor. Dillman observed a .32 caliber five-shot capacity revolver lying at Tally-Clayborne's feet. The firearm was loaded with three nine millimeter unfired cartridges.

¶3 Tally-Clayborne filed a motion to suppress any and all evidence recovered as a result of the police stop. Tally-Clayborne argued that he was unlawfully stopped, detained and searched because police had no information suggesting that Tally-Clayborne was committing a crime or a suspect in any illegal activity. The trial court held a hearing on the motion.

¶4 At the hearing, Dillman testified that at approximately 9:43 p.m. on the night of August 18, 2014, he and his partner were parked in their squad car at 3rd and Auer Streets in the City of Milwaukee when they heard the sound of gunshots. Dillman testified that the sound came from within a block of where he and his partner were parked. The officers drove out of the parking lot heading east on West Auer Street and then north on 2nd Street in the 3200 block. The officers

drove towards where they believed the gun shots came from and observed three individuals standing on the sidewalk at approximately 3227 North 2nd Street. Dillman testified that it took no longer than twenty to twenty-five seconds to get from their parked location to this address. Dillman did not see anybody other than the three individuals in the area.

¶5 Dillman stated that he asked the individuals to show their hands. The individuals told Dillman that they believed the shots came from a northern location, but Dillman did not believe them and proceeded to conduct a pat-down of one of the individuals. Mahnke began a pat-down of another individual. During the pat-downs, Dillman noticed Tally-Clayborne start to walk away. Dillman stated that he thought this was suspicious and told Tally-Clayborne to stop. Dillman said that he observed Tally-Clayborne reaching towards his waistband area with both hands. Dillman stated that based on his training and experience, the sound of gunshots in the vicinity, and the fact that Tally-Clayborne was reaching for his waistband, he believed Tally-Clayborne to be armed. Dillman then conducted a pat-down of Tally-Clayborne. During the pat-down, a chrome revolver fell to the ground.

¶6 The trial court denied Tally-Clayborne's motion to suppress. This appeal follows.

DISCUSSION

¶7 When an appellate court reviews a decision on a motion to suppress evidence, it upholds the trial court's findings of historical fact unless they are clearly erroneous. *State v. Blatterman*, 2015 WI 46, ¶16, 362 Wis. 2d 138, 864 N.W.2d 26. However, it independently reviews whether those facts satisfy constitutional principles. *Id.*

¶8 A police officer may initiate an investigatory stop if he or she “reasonably suspect[s] ... 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). An inchoate and unparticularized hunch will not suffice. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. “Rather, the officer ‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The reasonableness of a stop is determined based on the totality of the circumstances, using an objective, common sense standard. *See id.*, ¶13.

¶9 “A frisk or pat-down of a person being questioned during an investigatory stop is reasonable if the stop itself is reasonable and if the officer has reason to believe that the person might be armed and dangerous.” *Allen*, 226 Wis. 2d at 76. The officer’s belief must be based on specific and articulable facts. *See State v. McGill*, 2000 WI 38, ¶22, 234 Wis. 2d 560, 609 N.W.2d 795. The reasonableness of the frisk is determined using an objective standard, based on the totality of the circumstances. *Id.*, ¶23. The operative question is “whether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his safety and that of others was in danger.” *Id.* (citing *Terry*, 392 U.S. at 27).

¶10 Here, the totality of the circumstances provided Dillman with reasonable suspicion to stop Tally-Clayborne. Dillman heard two gunshots from within a block of the location he and his partner were parked. Dillman testified that based on his experience as an officer, he was familiar with the sound of gunshots. The shots were fired in the dark in the City of Milwaukee, which by

ordinance, prohibits the public discharge of a firearm.² Dillman traveled in the direction of the gunshots and within twenty to twenty-five seconds, Dillman saw Tally-Clayborne and two other individuals. Dillman did not see anyone else. Given the potential safety risk, the potential ordinance violation, the time of night the shots were fired, the fact that Tally-Clayborne and his companions were the only individuals visibly present in the area of the shooting, and the fact that Tally-Clayborne attempted to walk away from the officers patting down his companions while reaching for his waistband, Dillman could reasonably suspect that Tally-Clayborne was involved in some sort of criminal activity.

¶11 Based on the totality of the circumstances, Dillman also had reason to believe that Tally-Clayborne may be armed. Dillman heard gunshots within a block of the location he spotted Tally-Clayborne and his friends. No one else was in the area. Tally-Clayborne started to walk away while police were patting down the other two individuals, which Dillman said, based on his experience as an officer, was suspicious behavior. Tally-Clayborne also grabbed his waistband. All of these facts taken together show that Dillman had reasonable suspicion to believe Tally-Clayborne was armed with a dangerous weapon, thus justifying a weapons frisk.

¶12 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment affirmed.

² See MILWAUKEE, WIS., CODE OF ORDINANCES § 105-35(1), which states:

No person shall fire or discharge any cannon, gun, fowling piece, pistol, firearm, air rifle, air gun of any description, or any instrument which impels a missile or pellet by compressed air, spring or other means, within the limits of the city; provided, however, that the chief of police may from time to time issue to an authorized person or authority a permit for a specified purpose and period of time to use, fire and discharge any of the aforesaid weapons or instruments within the limits of said city.

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

