

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 2001

Cornelia G. Clark
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. 01-1425-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CM-3005

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DARRYL A. HARDING,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.¹ The State appeals from a trial court order suppressing all evidence resulting from the arrest of Darryl A. Harding. The State contends that the trial court erred in finding that the arresting officer did not have

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

“reasonable suspicion” to stop Harding pursuant to WIS. STAT. § 968.24 and *Terry v. Ohio*, 392 U.S. 1 (1968). The State additionally argues that the trial court’s determination was based in part upon an erroneous finding of fact.

¶2 We conclude that even assuming the trial court made an erroneous finding of fact, the police did not have the requisite reasonable suspicion to stop the vehicle in which Harding was a passenger. We affirm the trial court’s order.

FACTS

¶3 The arresting officer, Bart Engelking of the City of Brookfield Police Department, testified at the suppression hearing as to the facts surrounding Harding’s arrest. Engelking testified that at approximately 2:00 a.m. on October 30, 2000, he encountered Officer Brian Gasse of the Village of Elm Grove Police Department in a parking lot. The officers were discussing a previous theft from a vending machine that occurred in Elm Grove earlier that evening. Prior to this day, Engelking also had received teletype information regarding thefts during the preceding month from vending machines in the adjoining jurisdictions of Pewaukee and Waukesha. This information indicated that a pickup truck described as a “darker vehicle with a white cap” was possibly involved in the thefts. Apart from indicating that the vehicle was a “pickup truck,” the teletype did not provide any further information regarding the vehicle.

¶4 From the parking lot, the officers were able to observe an “illuminated” soda machine at a closed gas station across the street located within the Elm Grove jurisdiction. Their view of the soda machine became obstructed when a vehicle entered the gas station and parked in between the soda machine and the officers’ location. The vehicle, a pickup truck, “turned off its headlights, remained in that position for approximately 10 to 15 seconds and then left

proceeding westbound on Bluemound Road.” After a short discussion, Gasse went to check the soda machine for damage while Engelking followed the vehicle, prepared to stop it if necessary.

¶5 Engelking stopped the vehicle four or five blocks west of the gas station. He testified that he did so “[b]ased on the circumstance that there was a previous theft in Elm Grove to a soda machine that night, the vehicle matched the description of the previous teletypes of the vehicle that had been seen at prior jurisdictions where thefts had occurred, [and] that it was a suspicious activity that the vehicle turned its lights off in a closed business.” Engelking could not see the occupants of the vehicle prior to the stop because of the tinted windows; however, he noted “extraordinary movement in the vehicle” such that it rocked from side to side.

¶6 After stopping the vehicle, Engelking made contact with the driver and asked him for identification and inquired as to his purpose for stopping at the gas station. Because of the movement in the vehicle, Engelking asked the driver to exit the vehicle. While the driver was exiting, it was Engelking’s impression that the passenger was pushing something underneath the seat of the vehicle. Engelking asked the passenger what he was pushing under the seat and he replied, “[N]othing.” Engelking then requested the passenger to place his hands on the dashboard. Gasse arrived soon thereafter and attended to the passenger of the vehicle while Engelking spoke with the driver. Harding was later identified as the passenger in the vehicle.

¶7 According to the driver of the vehicle, he had stopped at the gas station for a soda and for gas. He denied turning his headlights off. Harding also indicated that they had stopped for a soda, discovered they did not have enough

money and so were planning to return home to Milwaukee. Engelking doubted Harding's response since there was an open gas station across the street where Harding and the driver could have stopped for soda and gas and because they traveled away from the direction of Milwaukee as they left the gas station.

¶8 Engelking searched underneath the seat, finding drug paraphernalia and multiple tools including a tire iron, screwdriver, flashlight, pry tools and a pair of white gloves. At some point during Engelking's search of the vehicle he received information confirming that the rear license plate on the vehicle had been stolen. Both Harding and the driver were arrested. Harding was advised of and waived his constitutional rights. He provided a statement admitting to numerous thefts from vending machines in the Milwaukee metropolitan area. The criminal complaint charged Harding with possessing a device intended to be used in breaking into a coin box, possession of stolen materials, possession of drug paraphernalia, and entry into a locked coin box. Prior to trial, Harding filed a motion to suppress the evidence obtained incident to his arrest claiming that the stop of the vehicle in which he was a passenger was illegal.

¶9 After hearing testimony at the suppression hearing, the trial court ruled that Engelking did not have sufficient articulable facts to justify a stop pursuant to *Terry*. The court granted Harding's motion to suppress. On April 13, 2001, the State filed a motion for reconsideration. Following a motion hearing on April 23, the trial court confirmed its earlier ruling and entered an order granting Harding's motion on May 7, 2001. The State appeals.

DISCUSSION

¶10 We first turn to the State's argument that the trial court erroneously found that Engelking did not have a description of the suspect vehicle prior to

making the stop. In reviewing a trial court's findings of fact and conclusions of law, we will not set aside the findings of fact unless they are clearly erroneous, and we will give due regard to the trial court's opportunity to judge the credibility of witnesses. WIS. STAT. § 805.17(2).

¶11 We first observe that the record is not entirely clear whether the trial court found, as the State contends, that Engelking did not receive the description of the vehicle until after he had made the stop. When making its bench ruling, the trial court said:

At that point the police officers, followed the vehicle, apparently four to five blocks, then executed a stop. It was during that period of time that the police officer receives notification of a description of a vehicle, which according to the testimony, matched the defendant's vehicle that ... had been involved apparently in other vending machine break-ins in Menomonee Falls and Pewaukee, a dark colored pickup truck with a white cap. The stop then is executed.

Unlike the State's interpretation, these words might well be saying that Engelking had verified that the vehicle matched the description previously provided *before* he made the stop. Moreover, Engelking's testimony was confusing. He testified that he had received a teletype just prior to his shift concerning a vending machine theft in Pewaukee or Menomonee Falls and indicating the vehicle description. The trial court then attempted to clarify when Engelking received the teletype and Engelking replied that the teletype he received was from "a week or it may have been from several weeks ahead of time" and had not concerned the theft earlier that evening. Nevertheless, Engelking testified that he contacted dispatch while following the suspect vehicle in order to "confirm [his] suspicions that the vehicle did match the teletype."

¶12 Regardless of the ambiguity in the record concerning this issue, we will adopt the State’s interpretation of the trial court’s remarks for purposes of this decision and assume that the trial court erroneously found that Engelking did not receive verification of the vehicle description until after he had accomplished the stop of the vehicle. However, as our discussion will reveal, we nonetheless uphold the trial court’s ruling.

¶13 The legality of the investigatory stop of the vehicle in which Harding was a passenger presents a question of law which we review de novo. *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). Nonetheless, we value a trial court’s decision on such a question. See *Scheunemann v. City of West Bend*, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶14 While the stop of a vehicle and the detention of its passengers constitutes a seizure within the meaning of the Fourth Amendment of the United States Constitution, there are situations in which an investigative stop may be constitutionally permissible when prompted by an officer’s suspicion that the occupants have committed a crime. *Guzy*, 139 Wis. 2d at 675. Whether an officer’s suspicion justifies an investigative stop involves an objective test. *Id.* “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 a crime.” *Id.* However, an “inchoate or unparticularized suspicion or ‘hunch’” will not suffice. *Id.* (quoting *Terry*, 392 U.S. at 27).

¶15 In granting Harding’s motion to suppress, the trial court found that the circumstances leading to the investigative stop essentially boiled down to “a car stopped at a [gas station].” Based on the prior information regarding the

description of the vehicle, the trial court determined that Engelking lacked the reasonable and articulable facts necessary to justify the stop. While we recognize that Engelking knew the general description of a vehicle involved in a vending machine theft prior to the date in question, we nonetheless conclude that he simply lacked sufficient facts necessary to justify the stop in this case.

¶16 In *Guzy*, the supreme court noted that the fundamental question involved in such a stop is “at what point does the important societal interest in solving crime and bringing offenders to justice *reasonably* justify the specific intrusion on personal security, i.e, an investigative stop.” *Guzy*, 139 Wis. 2d at 676. In making this decision, the following factors must be considered:

(1) the particularity of the description of the offender or the vehicle in which he [or she] fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender’s flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Id. at 677 (citation omitted).

¶17 Looking to each of these factors, we first observe that the officers did not have a description of the offenders. Instead, they had only a general description of the suspect vehicle—a darker pickup truck with a white cap—a description that would cover a multitude of vehicles. Second, the previous offense that evening had occurred about an hour before at a location nineteen blocks away. While the officers had the general description of the vehicle involved in the previous offenses on other days, they had no description of any vehicle or persons involved in this earlier episode on this particular day. Third, the officers testified

that it was approximately 1:00 a.m. and there was very little traffic. Fourth, the record presents no information as to the probable direction of the offenders' flight. Fifth, the pickup truck entered the parking lot of a closed gas station, parked by a soda machine, turned off its lights, and remained for ten to fifteen seconds before turning on the vehicle lights and exiting the parking lot. Sixth, the officers' suspicion of prior criminal activity was based on the prior description of the suspect vehicle.

¶18 We agree with the trial court that the issue in this case essentially boiled down to whether the general description of the vehicle associated with the prior episodes, coupled with the presence of the vehicle observed at the gas station equipped with a soda vending machine, constituted reasonable suspicion under *Terry* as codified in WIS. STAT. § 968.24.² Translated to *Guzy*, the question is whether the first factor (the description of the vehicle), measured against the fifth factor (the conduct observed by the officers), provided reasonable suspicion to detain the vehicle and its occupants.

¶19 While this is a close case, we agree with the trial court's ruling. As we have noted, the description of the vehicle involved in the prior episodes on prior days was general in nature. The description provided no further details such

² WISCONSIN STAT. § 968.24 states:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

as the make of the vehicle or a license plate number. The report of the prior episode on the day in question did not provide any identifying information regarding suspects or a vehicle. Although the gas station was closed for business, the evidence does not show that vehicles were barred from entering the premises. To the contrary, the public was invited to the premises by the illuminated soda machine. The vehicle remained on the premises for only ten to fifteen seconds before departing.

¶20 We deem this to be a “scant facts” case under *Guzy*, 139 Wis. 2d at 678. In that situation, the courts may look to whether the police had alternate means of further investigation such as a license plate check or closer observation of the suspect. *Id.* Here, the officers had such other alternative means of investigation available. The officers did not confirm that the license plate on the vehicle in question was stolen until after the vehicle was stopped and the occupants had been detained. Had the officers continued to follow the vehicle, they would have had the opportunity to confirm this information and could have made a legal stop of the vehicle.

¶21 *Guzy* will allow a stop on “scant facts” where the stop will create an opportunity to corroborate a known physical feature of a suspect or clothing description with minimal intrusion on personal security. *Id.* at 678-79. But here, the stop was not accomplished for this purpose. Nor could it have been since the police did not have any description of a suspect. As is borne out by the record, the additional information regarding the charged offense was obtained only after a search of the vehicle, which is more than a minimal intrusion on personal security.

¶22 The reasonableness of an investigative stop depends upon the facts and circumstances present at the time of the stop. *Id.* at 679. Although we do not

question the good faith of the police in this case, and although their hunch provided to be correct, the legality of a *Terry* stop and search is not measured by these considerations. We agree with the trial court that the police did not have a reasonable suspicion to stop the vehicle in which Harding was a passenger.³

CONCLUSION

¶23 We uphold the trial court order suppressing the evidence obtained incidental to Harding's arrest.

By the Court.—Order affirmed.

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

³ We therefore need not address the State's further argument that the length of Harding's temporary detention was reasonable. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

