

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2013

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. 2012AP1137-CR

Cir. Ct. No. 2010CF463

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE L. CHERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. Eugene L. Cherry appeals from his convictions for burglary and criminal damage to property, both as a party to a crime, on the basis that they were the result of evidence gathered subsequent to an unlawful arrest.

Cherry contends he was arrested without probable cause when law enforcement officers ordered him to the ground and searched him for weapons after discovering him and a companion walking down a rural road a mile away from the scene of a recent burglary. We disagree and affirm the circuit court as Cherry was not under arrest until law enforcement officers had gathered more information linking him to the burglary. The officers had reasonable suspicion to detain Cherry while they investigated his possible involvement in a crime, and the means they used for this detention were reasonable under the circumstances.

BACKGROUND

¶2 Law enforcement officers were investigating a residential burglary in the town of Addison when Washington County Sheriff's Detective James Wolf encountered two men walking down a rural road about a mile east of the burglarized residence. When he encountered the men, Wolf was looking for "two male black individuals" who had been seen heading eastward behind the burglarized residence in the direction of a wooded, swampy area about an hour before. Wolf and other officers had been warned about the possibility that the suspects had taken firearms from the burglarized house.

¶3 When Wolf spotted the two black men, both men's pants were wet from the knees down, with one of the men's pants noticeably covered with mud. One of the men was Cherry. Wolf and two other officers identified themselves and ordered Cherry and the other man to the ground. Wolf placed handcuffs on Cherry and patted him down for weapons while another officer did the same to Cherry's companion. No weapons were found. After Cherry was patted down, he was placed in a squad car while Wolf contacted a detective at the scene of the burglarized residence to obtain more information about the suspects. The

detective at the scene, who had interviewed a woman accompanying the two suspects, provided Wolf with descriptions of the suspects' height, weight, race, gender, and clothing, as well as an approximate age for one of the suspects. As the descriptions seemed to match Cherry and his companion, Wolf determined the two men were probably the burglary suspects that he was seeking. Cherry was thereafter taken to the sheriff's department, where he was made to empty his pockets. Wolf observed "a large amount of coins," including foreign currency, as well as some jewelry among the items that Cherry removed from his pockets at the sheriff's department. The items were later identified as property from the burglarized residence.

¶4 Cherry was charged with burglary and criminal damage to property, both as a party to a crime. Prior to trial, he moved to suppress the evidence taken from him at the sheriff's department on the basis that it derived from his "unlawful stop, unlawful arrest, unlawful detention and unlawful search." The court denied Cherry's motion. Cherry was convicted of both charges following a jury trial. Cherry appeals.

STANDARD OF REVIEW

¶5 We review Cherry's Fourth Amendment challenge to the court's denial of his motion to suppress evidence under two standards. *State v. Rissley*, 2012 WI App 112, ¶8, 344 Wis. 2d 422, 824 N.W.2d 853. We will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* We review independently the court's application of those facts to the constitutional principle of whether Cherry's seizure was reasonable. *Id.*

DISCUSSION

¶6 As we read his argument, Cherry claims that he was unlawfully arrested—and therefore unreasonably searched—as his arrest occurred when he was ordered to the ground by law enforcement officers and as the officers did not have probable cause for his arrest at that time. We reject this argument as Cherry was not under arrest at that time and the command for Cherry to get to the ground was issued as part of a proper *Terry* stop. To the extent that Cherry is arguing that officers did not have probable cause for an arrest at any time prior to when he emptied his pockets at the sheriff’s department, we find that the officers had probable cause for his arrest when they obtained additional information during Cherry’s detention that linked him to the commission of a crime. As such, Cherry’s seizure was reasonable, the search that uncovered the incriminating evidence was lawful, and the circuit court properly denied Cherry’s motion to suppress that evidence. We explain our reasoning below.

¶7 The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. A seizure occurs whenever a law enforcement officer “accosts an individual and restrains his freedom to walk away.” *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Law enforcement officers may lawfully seize an individual “if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime.” *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). This standard is flexible enough “to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect.” *Id.* at 676. Factors that courts should consider in determining whether an investigatory stop is reasonable are (1) the particularity of the description of the

offender, (2) the size of the area where the offender may be found, (3) the number of people in the area, (4) the known or probable direction of the offender's flight, (5) observed activity of the person stopped, and (6) knowledge or suspicion that the person stopped has been involved in other criminality of the type under investigation. *Id.* at 676-77. In addition, “[w]here an officer reasonably believes that his safety may be in danger because the suspect he is investigating may be armed,” he may “conduct a limited search for weapons” and use handcuffs to ensure his safety. *State v. McGill*, 2000 WI 38, ¶¶19, 38, 234 Wis. 2d 560, 609 N.W.2d 795.

¶8 Cherry was lawfully stopped under *Terry* by law enforcement officers during the investigation of a recent crime where the suspects were at large, possibly armed, and believed to be in the area. Cherry was seized by officers on the roadway while they collected facts to determine whether Cherry had committed the burglary that they were investigating. The officers needed to freeze the situation to prevent two potential suspects, who they believed were fleeing the scene of a crime, from getting away while they investigated further. *See Guzy*, 139 Wis. 2d at 676. Furthermore, the officers acted reasonably to protect their own safety and the safety of the public by handcuffing and conducting pat-down searches of the two men they were investigating for the burglary of a residence where firearms were kept unlocked.

¶9 Applying the factors adopted in *Guzy*, we find that the seizure of Cherry was reasonable. Cherry and his companion fit the bare-bones descriptions of the offenders known to the law enforcement officers at the time when they were seized. They were found about a mile from the burglarized residence, within an hour of the burglary, in a rural area without a lot of people around. They were east of the burglarized residence, which was the direction that the offenders were last

seen heading and where law enforcement officers believed the offenders had fled. They had wet pants, one visibly muddy, from which the officers could infer that they had been through the woods and wetlands between the burglarized residence and their present location. Lastly, they were stopped in the middle of an active investigation into a residential burglary and search for suspects. The officers were justified in seizing Cherry and his companion while they determined whether they were the burglary suspects.

¶10 Nor did the continued detention of Cherry and the use of restraints transform the stop into an arrest. The use of handcuffs or other restrictive measures does not necessarily make unreasonable a detention during an investigatory stop “nor does it necessarily convert that detention into an arrest.” *State v. Pickens*, 2010 WI App 5, ¶32, 323 Wis. 2d 226, 779 N.W.2d 1 (2009). However, “such measures generally are reasonable only when particular facts justify the measure for officer safety or similar concerns.” *Id.* We find that the measures employed by the law enforcement officers in this case were reasonable. At the time that Cherry was placed in handcuffs, the officers were concerned that Cherry might possess firearms. Cherry was suspected of recently fleeing the scene of a burglary and, therefore, could still be considered a likely candidate for flight. The officers also were justified in placing Cherry in a squad car, both for his own safety and to separate him from the other suspect, as they gathered further information on the side of a road. The continued detention was reasonable given the totality of the circumstances.

¶11 Insofar as Cherry is contesting whether the officers had probable cause to arrest him *at any time* prior to the search at the sheriff’s department, we find that Cherry was lawfully arrested when Wolf received information from the detective at the scene of the burglary that provided Wolf with a “quantum of

evidence” that led him to believe that Cherry and his companion had committed a crime. See *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Probable cause to arrest is judged by the facts of a case and requires more than a possibility or suspicion that the defendant committed a crime, although it requires less proof than is needed for a conviction. *Id.* Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Id.* at 215 (citation omitted). The “factual and practical considerations” of this analysis “are tested by whether they would lead any reasonable police officer to believe what was probable under the existing circumstances.” *Id.* (citation omitted). Probable cause deals with probabilities, not technical certainties. *Id.*

¶12 As we already have delineated, at the time that he was stopped, Cherry and his companion fit the general description of two men suspected to have burglarized a residence, were found a mile away from the site of the burglary within an hour of the burglary, and exhibited signs that they had come from the direction of the burglarized residence. During the *Terry* stop, Wolf obtained information about the two burglary suspects’ height, weight, race, gender, and clothing, as well as an approximate age for one of the suspects, from a detective at the scene of the burglary who had interviewed a suspected accomplice. Wolf came to a common-sense conclusion that, based on the similarity of the description to Cherry and his companion, there was a likely probability that Cherry and his companion had committed the burglary. Under the circumstances and facts known to Wolf and his fellow officers at the time, this was a conclusion any reasonable police officer would make. Therefore, there was probable cause to arrest Cherry for the commission of a crime prior to when he was transported to the sheriff’s department and subsequently searched.

CONCLUSION

¶13 Cherry's seizure by law enforcement officers during an investigation into a nearby and recent residential burglary was reasonable as it was based on specific facts linking him to the commission of a crime. The measures used by law enforcement officers to detain Cherry were reasonable as they collected sufficient information that provided probable cause for Cherry's arrest prior to his search at the sheriff's department. Thus, the court properly denied Cherry's motion to suppress evidence obtained from Cherry incident to that arrest.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

