COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1782-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IRVON L. CRAWFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Irvon L. Crawford appeals from a judgment of conviction of party to the crime of armed robbery. He contends that his case should have been severed from that of his codefendant, that the trial court should have ordered expert DNA testing of hairs recovered from a ski mask found at the crime scene, and that the victim's testimony and evidence recovered from

Crawford's car should have been suppressed. We conclude that by virtue of his no contest plea only the suppression issues are before this court. Suppression was not required and we affirm the judgment.

Crawford and two other men were charged with various crimes after two of the men entered an apartment while masked and armed with a knife and handgun. The female occupant of the apartment was beaten and her son was bound with duct tape. When the victim's boyfriend arrived home, he scuffled with the intruders, who then fled. The boyfriend observed the two men getting into a Chevy Blazer in which another man was waiting. The boyfriend called the police and a description of the Blazer was sent out over the police radio. Later that night, the Blazer in which Crawford and two other men were riding was stopped by the police. All three men were arrested.

A four-count information was filed against Crawford and codefendant Torrence Douglas. Crawford filed a motion for severance, a motion to authorize funds to allow him to obtain expert DNA analysis of hairs found on a ski mask recovered at the crime scene, and various motions to suppress evidence. On the day of trial, Crawford entered a no contest plea to one count.

Crawford challenges the trial court's denial of his motion for severance. The issue was waived by his no contest plea. *See* ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App 1994); ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984) (a valid guilty or no contest plea waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights). Also waived is Crawford's claim that the trial court should have authorized expert witness funds. Neither issue is related to the trial court's subject matter jurisdiction. Although, as Crawford

urges, we may in our discretion review nonjurisdictional errors, *see* ***County of Racine***, 122 Wis.2d at 434, 362 N.W.2d at 441, we see no reason to relieve Crawford of his waiver.

Crawford may assert claims regarding the suppression of evidence. *See* § 971.31(10), STATS. The first such claim is that Crawford's vehicle was subject to an illegal investigatory stop and that all evidence seized after the stop should have been suppressed.

When an appellate court reviews an order denying a motion to suppress the evidence, it will uphold the trial judge's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). However, whether an investigatory stop meets constitutional and statutory standards is a question of law subject to de novo review by this court. *See* ***id.*** The essential question which must be addressed by the reviewing court is "whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." ***State v. Jackson***, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989) (citing ***State v. Guzy***, 139 Wis.2d 663, 679, 407 N.W.2d 548, 555 (1987)). A police officer may only stop an individual if he or she possesses a suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual has committed, was committing, or is about to commit a crime; a "hunch" will not suffice. *See* ***State v. Waldner***, 206 Wis.2d 51, 56, 556 N.W.2d 681, 684 (1996). Six factors should be considered in making the required determination:

> (1) the particularity of the description of the offender or the vehicle in which he 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.

Guzy, 139 Wis.2d at 677, 407 N.W.2d at 554 (quoted source omitted).

Here, the officer who stopped Crawford's vehicle had heard the address of the alleged crime and that the offenders, an unknown number of African-American males, were heading north from the crime scene in a brown and white Chevy Blazer. The officer was north of the crime scene location and calculated that a probable escape route to the nearest interstate highway was via Highway 50. The officer stationed himself along Highway 50. Within thirteen minutes a Chevy Blazer approached his position. It was the first Blazer the officer observed since positioning himself. The Blazer appeared to be brown and white in color and the officer followed it. The officer then observed that the Blazer was blue and white but continued to follow it. He observed that three African-American males were in the Blazer. The officer stopped the Blazer as it was heading north on the interstate highway.

We conclude that the officer had articulable facts to support the stop. The Blazer matched the description of the vehicle of the offenders. It is unremarkable that the Blazer was actually blue and white when the description was that it was brown and white. It was still a two-toned vehicle. Although a Blazer may not be a distinctive automobile, such as a Jaguar or Porsche, the presence of the two-toned vehicle in the probable escape route from the crime scene was significant. In addition, the race of the vehicle's occupants matched that described. The officer's pursuit of the vehicle was the essence of good

investigatory police work. The stop was reasonable and the evidence seized was not subject to suppression.

Crawford contends that the destruction of the tape recording of the victim's 911 call was a violation of the prosecution's duty to preserve material evidence.[1] *See* ***State v. Oinas,*** 125 Wis.2d 487, 490, 373 N.W.2d 463, 465 (Ct. App. 1985) (state has constitutional duty to preserve evidence which might be expected to play a significant role in the suspect's defense). As a sanction, Crawford argues that all of the evidence seized from the victim's apartment should have been suppressed.

Crawford suggests only that the 911 tape may have been exculpatory because the victim "could have given a description of the attackers, statements made by her attackers, the number of attackers, and whether there actually was a gun used in the attack" which may have contradicted her subsequent statements. The exculpatory nature of the 911 tape was not readily apparent, and, at best, it was only "potentially useful evidence."[2] *See* ***State v. Greenwold***, 181 Wis.2d 881, 885, 512 N.W.2d 237, 239 (Ct. App. 1994) (***Greenwold I***); *see also* ***State v. Tarwid***, 147 Wis.2d 95, 105, 433 N.W.2d 255, 259-60 (Ct. App. 1988) (materiality exists when it is shown that the evidence possesses an exculpatory value that was apparent before it was destroyed and that it was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means). In order to establish a due process violation by the

[1] The trial court never made a factual finding about whether the victim's call was tape recorded.

[2] After an in camera hearing, the trial court found that Crawford had not established the plausibility that the victim's statements to the 911 operator were exculpatory.

destruction of potentially useful evidence, the defendant must demonstrate bad faith on the part of the police in the destruction of the evidence. *See* ***Greenwold I,*** 181 Wis.2d at 885-86, 512 N.W.2d at 239; *see also* ***State v. Greenwold***, 189 Wis.2d 59, 67-68, 525 N.W.2d 294, 297 (Ct. App. 1994) (***Greenwold II***).

Crawford has not shown any bad faith by the police or prosecutor in the destruction of the 911 tape recording. Bad faith exists if police were aware of the potentially exculpatory value of the evidence and they acted with official animus or made a conscious effort to suppress exculpatory evidence. *See* ***Greenwold II***, 189 Wis.2d at 68-69, 525 N.W.2d at 297. The prosecutor had requested the tape recording of the 911 calls but was not aware if the victim's call was in fact recorded. There was no explanation for the inability to locate a recording of the victim's 911 call. Official animus or intentional efforts to destroy the tape recording was not demonstrated. Crawford's right to due process was not violated.[3]

[3] Crawford has also failed to establish why the evidence seized from the victim's apartment would be subject to suppression even if the 911 tape recording was improperly destroyed. Given that neighbors and the victim's boyfriend called 911 and called officers to the apartment, the victim's call was not the single link to discovery of the evidence. Suppression would not be required to obtain a fundamentally fair trial. *See* ***State v. Disch,*** 119 Wis.2d 461, 469, 351 N.W.2d 492, 496 (1984) (sanction imposed only if fundamental fairness is compromised).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.