

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 4, 2000

Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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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.

**No. 99-2748-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**PATRICK JAMES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Reversed and cause remanded.*

¶1 CURLEY, J.<sup>1</sup> Patrick James appeals from the judgment of conviction, upon a plea of guilty, to one count of carrying a concealed weapon,

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

contrary to WIS. STAT. § 941.23,<sup>2</sup> and from the order denying his motion to suppress evidence. James argues that the trial court erred in denying his motion to suppress evidence obtained by police during an investigatory stop because the police did not have a reasonable suspicion that he had engaged in criminal activity to justify the stop. This court concludes that, based on the totality of the circumstances, the police did not have a reasonable suspicion justifying an investigatory stop, and, therefore, this court vacates the judgment of conviction and reverses the trial court's order denying James' motion to suppress.

### **I. BACKGROUND.**

¶2 On January 26, 1999, Milwaukee Police Officers Eyre and Kopacka received a report of a shooting at a gas station at 4000 North Sherman Boulevard. According to the report, immediately following the shooting, a car chase ensued and the suspects' car crashed between 35th and 36th Streets on Hampton Avenue. The report indicated that after the car crashed the suspects jumped out and fled on foot. The only description of the suspects given to the police was that there were three, or possibly four, black males involved in the incident and one of the suspects was reportedly wearing a red jacket and another wearing a yellow jacket. Following the report, Officers Eyre and Kopacka responded to the area.

¶3 Monitoring the computer-assisted dispatch (CAD) reports over the radio in their squad car, Officers Eyre and Kopacka began to look for the suspects. While doing so, the officers received CAD reports that the driver of the car had been arrested almost immediately after the car crash, and a second suspect had

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise specified.

been taken into custody several minutes later. Shortly thereafter, a third suspect, wearing a yellow jacket, was apprehended. The CAD reports indicated that all three suspects had been apprehended within fifteen minutes of the crash. The reports also indicated that the suspects were stopped within a few blocks of the scene of the crash.

¶4 Twenty-three minutes after the crash, and about ten minutes after the last CAD report informed the officers that a suspect wearing a yellow jacket had been apprehended, the officers observed James and a companion walking in a mixed residential/commercial area approximately ten to twelve blocks from the scene of the crash. Officer Eyre testified that James, a black male, was wearing a light-colored or tan jacket, and that his companion “could have been” wearing a blue jacket. James and his companion appeared to simply be walking down the sidewalk; they did not appear to be out of breath, nor did their appearance show any evidence of having been in a car accident. When they observed the squad car, they did not attempt to flee. Nevertheless, one of the police officers testified that because James was wearing a tan jacket, they believed that he matched the description of the suspect wearing the yellow jacket and they decided to stop him.

¶5 The officers approached James and his companion and ordered the two men to put their hands up. After Officer Eyre conducted a pat-down search of James, he discovered a gun in his pocket. James was subsequently charged with one count of carrying a concealed weapon.

¶6 James filed a motion to suppress the gun, claiming that the initial stop was illegal because the police did not have a reasonable suspicion that he was

engaged in criminal activity.<sup>3</sup> In deciding whether the stop was supported by reasonable suspicion, the trial court asserted that this case “is on the bubble,” and “is at the outside of the limit” of the quantum of information sufficient to form a reasonable suspicion. The court was also remarked that it was troubled by the substantial amount of time that passed between the crash and the officers’ observation of James. Nevertheless, the court, in tackling the fact that the report described a yellow and not a tan jacket, noted that the jacket James was wearing was “light colored, which is close enough, but not right on the money for a person in a yellow jacket.” The court then found that “this is the kind of articulable suspicion that the court is looking for,” and the court denied James’ motion to suppress. James then pled guilty and was sentenced to twenty-five days in the House of Correction. After James had served five days of the sentence, the trial court granted his motion to stay the remainder of the sentence pending appeal to this court.

## II. ANALYSIS.

¶7 James raises one issue on appeal—whether the trial court erred in denying his motion to suppress evidence because the gun was obtained following an illegal investigatory stop. James argues that the initial stop was illegal because the officers did not have a reasonable suspicion that he was engaged in criminal activity. James contends that, because the search was conducted incident to an illegal investigatory stop, the evidence obtained as a result of the search must be

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<sup>3</sup> James’ motion to suppress also challenged the legality of the search. James claimed that the search was illegal because the officers had no reason to fear for their safety. On appeal, James challenges only the legality of the initial stop.

suppressed as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). This court agrees.

¶8 The validity of an investigatory stop and temporary detention is governed by *Terry v. Ohio*, 392 U.S. 1 (1968), and is codified in WIS. STAT. § 968.24. See *State v. King*, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). To execute a valid investigatory stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that criminal activity has, is, or is about to take place. See *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Such reasonable suspicion must be based on specific and articulable facts which, when taken together with rational inferences from those facts, and judged against an objective standard, would warrant a person of reasonable caution to believe that the action taken was appropriate. See *id.* The determination of reasonableness,

“is a common sense question, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.”

*Id.* at 139-40 (citation omitted). In ascertaining the reasonableness of an investigatory stop, we must consider the totality of the circumstances. See *id.*

¶9 In *State v. Guzy*, 139 Wis. 2d 663, 407 N.W.2d 548 (1987), our supreme court recognized that the mere “incantation of the traditional test for investigatory stops—‘specific and articulable facts’—at times provides little guidance for courts ... in determining the quantum and nature of information necessary to establish the reasonableness of the stop.” *Id.* at 676. To assist in making this determination, the court employed six factors:

“(1) the particularity of the description of the offender ...; (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 ... stopped has been involved in other criminality of the type presently under investigation.”

*Id.* at 676-77 (citation omitted). Recognizing that some of the factors may not be applicable, the court concluded that an accurate application of these factors requires courts to analyze them in conjunction with “the facts *and* circumstances present” in each case. *Id.* at 677 (recognizing the difficulty inherent in determining the number of facts that must be present, the weight to be given to each fact, and the point at which the presence of one fact or another crosses the line from hunch to reasonable suspicion).

¶10 Here, the facts and circumstances surrounding the investigatory stop are as follows: The suspects’ car crashed, and three or four suspects fled at approximately 9:27 p.m. From the investigation’s inception, the information available to the officers regarding the suspects was that the officers should be looking for three or four black males. Other than the fact that the suspects were black males, the only physical description of the suspects was that one was wearing a red jacket and another was wearing a yellow jacket. Thus, the description was limited. From the frequently-updated CAD reports that the officers received in their squad car, the officers were aware that three of the suspects, including one wearing a yellow jacket, had been apprehended within minutes of the crash, and only a few blocks from the wrecked car.

¶11 At 9:50 p.m., twenty-three minutes after the crash, the officers spotted James and his companion ten to twelve blocks from the wrecked car.

Officer Eyre's testimony indicates that James, a black male, was wearing a tan jacket and his companion was wearing a blue jacket. The two men were walking two blocks from a busy intersection, in an area where it was not uncommon for people to be walking at that time of night. Neither James nor his companion appeared to be out of breath, nor did they exhibit any evidence of being in a car crash. Neither man attempted to flee when they observed the squad car. Nevertheless, the officers decided to stop James because they concluded that his tan jacket matched the description of the suspect allegedly wearing a yellow jacket.

¶12 First, this court addresses James' argument that the police could not continue to detain individuals based upon the description of a suspect after an individual matching that description has already been detained. James submits that, once the police apprehended an individual in a yellow jacket, they could not have stopped him even if he had been wearing a yellow, and not a tan, jacket. This court rejects James' argument. It is unclear to this court how society's interest in solving crime is served by prohibiting the police from stopping more than one suspect who fits a particular description. This court refuses to recognize a rule that would allow viable suspects to escape apprehension simply because the police happened to stop another suspect first who coincidentally matched a particular description. However, under the circumstances presented here, while the fact that the police apprehended an individual wearing a yellow coat, mere blocks from the scene, and minutes after the crash, did not prohibit them from looking for additional suspects wearing yellow coats, this factor did reduce the likelihood that someone wearing a tan coat spotted twenty-three minutes after the crash and a mile from the scene was a viable suspect.

¶13 Next, under the totality of the circumstances, we cannot conclude that there are sufficient specific and articulable facts present here to justify the investigatory stop of James. When we consider the limited information available to the officers regarding the number and physical description of the suspects, the fact that three suspects had been detained, including one wearing a yellow jacket, the appropriate conduct of James and his companion, upon seeing the squad car, and the elapsed time and distance from the scene of the crash, we cannot conclude that the officers reasonably suspected that James was involved in criminal behavior. James and his companion would have had to have traveled approximately one mile in twenty-three minutes. Although not impossible, neither suspects' appearance matched the description of the suspect wearing the yellow jacket. Nor did the conduct or the appearance of James and his companion give rise to suspicion. Neither was winded or suffering from any obvious injuries. Neither attempted to avoid the police. Taking all of these factors into consideration, this court cannot reach the conclusion that the officers had a "reasonable suspicion."

¶14 While this court will not speculate regarding what specific additional facts and circumstances, if any, would be necessary to form a reasonable suspicion justifying a stop under these conditions, this court might have reached a different conclusion had the police spotted a black male wearing a tan coat within the same time and distance parameters as the other suspects that were apprehended in this case. Conversely, had a black man in a yellow coat been spotted walking on the sidewalk at the same time and place that James was spotted, or a suspect possibly showing some effects of a car crash, this court's decision might also have been different. However, to conclude that the officers acted reasonably in this instance, this court would, in effect, be forced to conclude that the officers were free to



apprehend any black male wearing a jacket, within a one mile radius, extending that area even farther as time passed.

¶15 Under the totality of the circumstances, this court is not prepared to conclude that reasonable suspicion justifying an investigatory stop can be formed based on such a tenuous link. For these reasons, this court concludes that, because the investigatory stop of James was not supported by reasonable suspicion, the stop was illegal and, therefore, the motion to suppress should have been granted. Consequently, this court vacates the judgment of conviction and reverses the trial court's order denying James's motion to suppress.

*By the Court.*—Judgment and order reversed and cause remanded.

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

