

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2006

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. 2004AP123-CR

Cir. Ct. No. 2001CF4984

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIE EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Willie Evans appeals from a judgment of conviction for being a felon in possession of a firearm, carrying a concealed weapon, and resisting an officer. The issues are whether temporarily detaining Evans was constitutionally permissible at the outset, and whether his continued

detention and second protective frisk, which yielded a gun, were also justified pursuant to the Fourth Amendment. We conclude that the temporary investigative detention of Evans, after observing him “loitering” and “quickly” entering an unlocked apartment building designated as a “troubled hot spot” of criminal activity each time he saw police was constitutionally permissible, and that Evans holding his leg, rather than standing up to facilitate his prompt release was suspicious conduct, reasonably justifying his continued detention and second protective frisk. Therefore, we affirm.

¶2 Before pleading guilty, Evans moved to suppress the gun. Milwaukee Police Officer Richard Gordy testified to the following facts at the suppression hearing. On September 18, 2001, at approximately 11:00 p.m., Officer Gordy and his partner, Milwaukee Police Officer Michelle Roman, were on uniformed patrol in a marked police squad car near 9130 West Brown Deer Road, which was designated as a “hot spot, classified as area specific, meaning that there’s an increased crime trend of specific crimes that have been taking place in that graphical area[] and, therefore, they have increased police patrol to help suppress[] the crime.”¹ From approximately sixty feet away, Officer Gordy observed three black males (allegedly) loitering in front of a large apartment building. Once the men saw the officers, they quickly entered the unlocked apartment building. Officer Gordy testified that the men looked “very suspicious.” When asked to elaborate, he testified:

¹ Officer Gordy had been involved in a major drug arrest in that building or the building next door, where a shotgun was thrown out of a window, and a large quantity of narcotics were recovered. He was familiar with that area, having been assigned to that patrol for many years.

The fact that it's an area of known problems with the police department, illegal drug trafficking, entry to autos in that area, there was an increase of robberies, they looked at the police and as soon as they s[aw] us, they entered the building in a way that led me to believe that they were up to something unlawful.

¶3 In describing the encounter, Officer Gordy testified that he approached the north door of the apartment building while his partner approached the south door. Officer Gordy continued, that upon seeing the uniformed officers, the three men “turned back around and ran back inside the building.” After catching up with the men, the officers identified themselves and told them that they were being stopped for loitering and asked why they were in the building. After several minutes, one of the men responded that they were visiting “their guy” in apartment six, which was about twenty feet away.

¶4 Officer Gordy performed a pat-down (protective) search of the three men and found no weapons. Officer Gordy asked the three men to sit in the hall while he determined whether any of them were wanted by the authorities. While awaiting the results of the “wanted check,” Officer Gordy went to apartment six and asked the occupant if he knew the three men; he knew only one of them, not Willie Evans. Shortly thereafter, the results of the “wanted check” revealed that one of the men, Curtis Evans, Willie Evans’s cousin, also the man known by the occupant of apartment six, was subject to an outstanding warrant; Curtis Evans was then arrested. Officer Gordy decided to frisk Evans and the third man again, “[i]n case [he] missed a weapon. It happens,” telling them that after he issued loitering citations to them they would be released.

¶5 After frisking the third man, Officer Gordy directed Evans to stand. Evans complained of leg pain and was holding his right shin while slowly moving his hand down his pants leg.² Officer Roman asked Officer Gordy to frisk Evans again; both feared that Evans was concealing a weapon. Officer Gordy decided it would be safer to frisk Evans on the ground floor rather than in the upper hallway. Once downstairs, Officer Gordy asked Evans to put his hands on the wall and to spread his feet. As Officer Gordy brushed his foot against Evans's right leg, a gun fell to the floor. Officer Gordy then arrested Evans.

¶6 We first consider the constitutional propriety of the temporary detention of Evans and his two companions. A temporary investigative stop is constitutionally permissible when there is no probable cause to arrest if, at the time of the stop, the officer possesses specific and articulable facts, which would warrant a reasonable suspicion that unlawful activity might be afoot. *See Terry v. Ohio*, 392 U.S. 1, 21-22, 30 (1968); *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). WISCONSIN STAT. § 968.24 (2001-02) codifies *Terry* and its progeny and provides:

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.

² The testimony sometimes refers to Evans's problematic leg as his right, and at other times, his left. The quoted testimony refers to Evans's right leg. Whether the leg in issue was actually Evans's right or left is immaterial to our decision.

The officer's suspicion must be reasonable, and more than an inchoate, unparticularized "hunch." See *Terry*, 392 U.S. at 27. The reasonableness of the officer's suspicion is assessed in the context of the totality of the circumstances at the time of the stop. See *Waldner*, 206 Wis. 2d at 58. In reviewing an order denying a suppression motion, an appellate court sustains the trial court's factual findings, unless they were contrary to the great weight and clear preponderance of the evidence, and then it independently determines whether the investigative detention was constitutionally reasonable. See *State v. Malone*, 2004 WI 108, ¶14, 274 Wis. 2d 540, 683 N.W.2d 1.

¶7 At the conclusion of the suppression hearing, the trial court found that Officers Gordy and Roman were on patrol in an area designated by the Milwaukee Police Department as a hot spot, when Officer Gordy observed three black males in front of an apartment building.

The court further finds that Officer Gordy saw these three individuals enter that building in a hurried fashion. The court finds this to be true and makes this finding of fact not only based upon Officer Gordy's testimony but on the testimony of the defendant, who indicated that he had been in front of the apartment building, rang the doorbell, ultimately the door was opened by someone from inside, and summoned Curtis Evans who was near by ... to come in. By his own testimony Curtis Evans rushed in or ran over from where he was, consistent with what at least the officer observed from about 60 feet away.

Now the court makes this finding and notes that certainly the officer could have inferred from that that they were quickly hurrying in the building upon observing them, and that is consistent with what the defendant describes at least as to how they entered that building.

....

Based upon [its findings that Officer Gordy was familiar with that location and its designation as a hot spot, where there had been loitering, auto entries, drug activity and armed robberies, as recently as a week or two before],

the court finds that the officer had some reasonable suspicion at least as to having observed what he did that there might be some improper activity afoot. At least the court finds from that observation the officer was certainly within his authority to pursue this further.

¶8 We conclude that these factual findings are not contrary to the great weight and clear preponderance of the evidence. Officer Gordy testified that he saw three men loitering in front of the apartment building, a known “troubled hot spot” for recent criminal activity, and once the men saw the officers in the squad car, they “quickly entered the unlocked building.” Although Evans disputes that they were loitering, or fleeing when they later saw police and quickly re-entered the apartment building, that is not the test. See *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (“police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop”). We conclude that the totality of the circumstances, coupled with Officer Gordy’s experience and familiarity with this particular “hot spot,” support his reasonable suspicion that unlawful activity may have been afoot, justifying a temporary investigative detention.

¶9 The second issue is whether the continued detention and protective frisk of Evans was constitutionally permissible pursuant to the Fourth Amendment.

Once a justifiable stop is made—as is the case here—the scope of the officer’s inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer’s attention—keeping in mind that these factors, like the factors justifying the stop in the first place, must be “particularized” and “objective.” If, during a valid [temporary detention], the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s

intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

State v. Betow, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999) (footnote and citation omitted).

¶10 Once Evans and one of his companions were cleared by the “wanted check,” Officer Gordy testified that he told them that he would issue them loitering citations, but that they would then be released. Although Evans’s companion stood up as directed, Evans complained of leg pain. Officer Gordy testified that Evans “was holding his right lower leg, the shin area, and he was slowly moving his hand downward, down the outer part of his pants leg. It made [Officer Roman] afraid that [Evans] had a gun on him. She asked me to pat him down again.” Officer Gordy also believed that Evans had a gun, which he missed when he initially frisked him. Officer Gordy decided that another protective frisk was warranted because of Evans’s suspicious behavior, coupled with his very loose-fitting slacks. Officer Gordy directed Evans to stand with his legs apart and his hands on the wall; when he brushed his foot against Evans’s leg, a pistol fell to the floor. Evans’s conduct, coupled with experienced officers’ suspicions, which we conclude were reasonable under the totality of the existing circumstances, justified the continuing detention and subsequent protective frisk. *See Malone*, 274 Wis. 2d 540, ¶24.

¶11 Evans contends that once Officer Gordy was notified that Evans was not subject to an outstanding warrant, and that his reason for being in the building (to visit the occupant of apartment six) was confirmed, he should have been immediately released, not detained for an additional ten minutes. Officer Gordy testified, however, that he would have issued loitering citations regardless of

whether the occupant of apartment six knew any of the three men because he did not believe that they were there simply to visit someone in apartment six based on their “suspicious behavior in front of the building.” Officer Gordy “believe[d] that they were about to conduct some type of illegal act in front of the building at the time.” At the point where Evans continued to hold his leg, rather than getting up to (receive his loitering citation and then) leave, Officer Gordy’s suspicions were reasonable, prompting a second and constitutionally appropriate protective frisk. We therefore conclude that the initial and continued detention and protective frisks were constitutionally reasonable, and that the gun discovered during the second protective frisk of Evans was lawfully seized.

By the Court.—Judgment affirmed.

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

