COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3146-CR **Cir. Ct. No. 2006CM286**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSIAH ISRAEL SEALS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Reversed and cause remanded with directions.*

¶1 FINE, J. Josiah Israel Seals appeals the trial court's order denying his motion to suppress evidence. Following that denial, Seals pled guilty to

carrying a concealed weapon.[1] The State concedes that the trial court erred in denying Seals's motion, and, although we are not, of course, bound by the State's concession, *see* ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626, 629 (1987), we agree. Accordingly we reverse.

I.

¶2 This case had its genesis on January 10, 2006, at around half-past nine at night, when a Milwaukee police detective, Keith Dodd, was, as related in his incident report, "conducting a gun and drug investigation" in the twenty-six-hundred block of North 22nd Street in Milwaukee, when he heard what appeared to be gun shots fired "from the southwest of the location." Dodd spoke with a person who claimed to have been shot at. The person told Dodd, again, as related by Dodd's incident report:

> [The person] stated thathe [*sic*] was walking with a group of friend [*sic*] in the area of 2400 N 23th [*sic* as to the superscript] St. He then stated that a Dark colored (possibly blue) Cadillac with a white top drove up on them. He stated that a black male subject inside the auto shouted something at the group and then fired several shots at them.

(Capitalization of "dark" in the original.)

¶3 Two days later, shortly after 10 p.m., again according to Dodd's incident report, Dodd was "patrolling in the area of N. 23rd St and W. Center," when he saw what the incident report relates was a car that "matched the description that was giving [*sic*] to me by" the person who had told him about the shooting two days earlier. Dodd and his partner stopped the car, and discovered in

[1] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(10).

the car's unlocked glove compartment a boxed handgun whose bullet magazine was "out."

¶4 Seals was driving the car. The car, however, *did not* match the car described to Dodd two nights earlier—Seals's car was green with a white top, not blue. Indeed, Dodd's incident report recited that Seals was driving a "green" car when stopped. Thus, nothing connected Seals's car with the car from which the shots were fired other than that they were both Cadillacs and both green and blue could be considered, perhaps, "dark" colors. Significantly, when the trial court learned at the sentencing hearing that Seals's car was green and not blue, the trial court noted that at the suppression hearing it "was under the impression that [Seals's] car matched the description far better than what I'm being told now," and that "it's a different color vehicle supposedly, correct?" Seals, replied, without contradiction by the State, "Right."

II.

¶5 Whether an investigatory stop was legally justified presents a question of law that we decide *de novo*. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). An investigatory stop is permissible if the law enforcement officer reasonably suspects, considering the totality of the circumstances, that some type of criminal activity either is taking place or has occurred. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830, 834 (1990). As the parties recognize, the principle governing whether Seals was stopped lawfully was restated by ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548, 554 (1987): "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." The test is objective. ***Ibid.*** When a stop of an automobile is challenged, a court may consider the following factors in determining whether the officers acted lawfully:

> "(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."

Id., 139 Wis. 2d at 677, 407 N.W.2d at 554 (quoted source omitted). As the trial court apparently realized at sentencing, the facts here do not, by any stretch of the imagination, satisfy the ***Guzy*** criteria. Accordingly, we reverse the trial court's order denying Seals's motion to suppress, and remand to the trial court with directions that it vacate the judgment of Seals's conviction forthwith.[2]

By the Court.—Order reversed and cause remanded with directions.

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

[2] All the lawyers representing their clients on this appeal, Michael J. Gonring, Esq., James M. Schoenecker, Esq., David A. Strifling, Esq., and Peter A. Tomasi, Esq., for Josiah Israel Seals, and Karen A. Loebel, Esq., for the State, are commended for the excellence of their briefs.