

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP2882-CR

Cir. Ct. No. 2006CF749

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID W. DEFFKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
TIMOTHY A. HINKFUSS, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. David Deffke appeals from a judgment of conviction for three counts of burglary, entry into a locked vehicle, criminal damage to property and two counts of misdemeanor theft, all as party to a crime. Deffke argues the circuit erred by denying his motion to suppress evidence

obtained after a traffic stop was concluded. We agree. We therefore reverse and remand for further proceedings.

¶2 On July 21, 2006, at approximately 2:05 a.m., officer James Blanke stopped a vehicle driven by Deffke after determining the vehicle's license plates were expired.¹ After stopping the vehicle, Blanke discovered Deffke's drivers license was revoked. The vehicle was owned by the passenger, who was identified as Mitchell Williams.² Blanke asked for consent to search the vehicle:

[B]ecause the way they were talking and telling me their story they – it wasn't matching. After they refused, I advised – after giving citations, I advised them they were free to go but they could not drive. At this time Officer Pasket noticed that [Deffke] had a pocketknife on him and patted him down.

¶3 Officer Lee Pasket informed Blanke that Deffke “had a knife in his pocket, a box knife, and I had it on the hood of the patrol car.” Pasket performed a pat down search of Deffke to make sure there were no other weapons.³ Williams

¹ The facts are taken from the suppression hearing transcript in the case of Deffke's co-actor Mitchell Williams, which the parties agreed would be used in the suppression hearing for Deffke.

² Williams was given a warning for suspended license.

³ Pasket testified at the suppression hearing that upon his arrival at the scene to assist Blanke, he approached on the passenger side of the vehicle. Pasket testified that his first observation of the vehicle was that it had “quite a bit of stuff in [it].” Blanke asked him to stand with Deffke after Blanke issued paperwork at the front of the patrol car and while Blanke went with Williams to the rear of the patrol car to speak with him separately. Pasket testified that while speaking with Deffke, he noticed:

a pocket-styled knife sticking out of the top of the pocket, the hip pocket, of his pants. It had the clip that would hook on a pocket. It was blue in color, and it – I did inform him that I was going to hold onto that – to that until everything was completed being that, you know, it's a knife and for safety reasons for himself as well as myself and Officer Blanke.

was by the vehicle attempting calls on a cell phone to arrange for a ride. Blanke noticed a large amount of purple latex gloves in Williams' back pocket, which Blanke associated with narcotics use. Prior to that time, Blanke had a conversation with Pasket, who advised that he was not feeling comfortable with the situation, so Blanke stated he was going to pat down Williams. During the pat down, Blanke discovered a cigarette pack in Williams' front pocket. Blanke opened the cigarette pack and observed a razor blade and a straw, which he associated with the ingestion of cocaine. Based on the drug paraphernalia, Williams was taken into custody. The officers then searched the vehicle incident to arrest and discovered "[s]everal burglarious tools, several stolen I.D. cards, credit cards, other identification cards, cut-off locks in the trunk, pry bar, [and] sledgehammer." Deffke was then placed into custody. Deffke subsequently made a statement to the police admitting involvement in burglaries, illegal vehicle entries and theft.

¶4 Deffke filed a Motion to Suppress Fruit of Illegal Detention and also a Motion to Suppress Fruit of Illegal Arrest. After the hearing to consider both motions, the circuit court issued a decision and order denying the suppression motions. Deffke pled no contest to seven of the eight charged counts. The court withheld sentence and imposed four years' probation on the burglary counts and nine months' jail on the remaining counts, all concurrently. This appeal follows.

¶5 Deffke concedes that the initial interference with his liberty was justified. He acknowledges that Blanke acted with lawful authority when he stopped the vehicle for expired license plates. However, Deffke argues once the officers told Deffke and Williams they were free to go, the initial purpose of the stop was completed and there was no articulable suspicion that would have made it constitutionally permissible to continuously detain Deffke. We agree.

¶6 The reasonableness of a *Terry*-type stop depends “on whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interaction in the first place.” *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). For the detention to be justified at its inception, an officer “must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law.” *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. “The reasonableness of a stop is determined based on the totality of the facts and circumstances.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶7 The circuit court relied upon *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999), for the proposition that a detention may continue if officers become aware of additional suspicious facts during a valid traffic stop that give rise to an articulable suspicion. The court concluded the events in the present case “were mixed and occurring simultaneously.” The court stated:

After issuance of the ticket, further suspicious facts continued and developed. First, Mr. Deffke and Mr. Williams gave vague and inconsistent answers about their activities that night. Secondly, the men were aimlessly driving which caught the attention of the police in the first place. Lastly, the police witnessed possible tools of burglary, i.e., a box knife, latex gloves and a long piece of electrical conduit.

¶8 We acknowledge police need not terminate an encounter if an officer becomes aware of additional information during a valid traffic stop. *See id.* However, the aimless driving that caught Blanke’s attention occurred *before* the

stop was initiated. The inconsistent answers occurred before the traffic stop was terminated and Deffke and Williams were told they were free to leave.⁴ Accordingly, this information could not constitute additional suspicious information justifying continuation of the stop.

¶9 Moreover, the evidence does not support the circuit court's conclusion that during the valid traffic stop the officers considered the box knife, latex gloves or electrical conduit in the vehicle to be possible tools of burglary. Pasket testified he retained the box knife and patted down Deffke for safety reasons. And, irrespective of whether in fact the box cutter was a reasonable threat to the officers' safety once the individuals were told they were free to leave, Pasket testified he placed the box cutter on the hood of the patrol car, and discovered no other weapons during the pat down of Deffke.

¶10 Williams' patdown was not interwoven with either the initial traffic stop or the frisk of Deffke. Williams was patted down because Pasket "was not feeling particularly comfortable with the situation," and because latex gloves were

⁴ The traffic stop ended when Deffke received the citation and was told he was free to leave. Wisconsin courts have concluded that a stop was over when the officer returned the defendant's drivers license or identification card after issuing a citation or warning. See *State v. Williams*, 2002 WI 94, ¶26, 255 Wis. 2d 1, 646 N.W.2d 834; *State v. Jones*, 2005 WI App 26, ¶7 n.4, 278 Wis. 2d 774, 693 N.W.2d 104. Moreover, in *State v. Gammons*, 2001 WI App 36, ¶24, 241 Wis. 2d 296, 625 N.W.2d 623, we considered it significant the intrusion occurred after the purpose of the traffic stop ended. The State argues *Gammons* is distinguishable, but we disagree the case is distinguishable on the point in question. Here, the circuit court found it was "unclear" whether the detention of Deffke continued after he received the citation, because "an argument could be made that Officer Pasket and Mr. Deffke were waiting on events between Officer Blanke and Mr. Williams." The court reasoned that "the officers testified that the men were free to go as long as someone could pick them up who had a driver's license." The court's statement is contrary to the record. Blanke testified, "[A]fter giving citations, I advised them they were free to go but they could not drive." Although Deffke and Williams were told they could not drive the car because they lacked valid licenses, Blanke testified there was no intention to impound the vehicle, and there is no evidence their release was conditioned upon obtaining a ride.

observed in Williams' pocket. In *Betow*, we concluded a detention was unjustified when Betow appeared nervous after being stopped late at night returning to Appleton from Madison, a city the State claimed was well-known for its drug activity, his story about what he was doing in Madison appeared implausible, and his wallet had a picture of a mushroom on it. *Id.* at 92-97. The officer testified that in his experience some people used mushrooms to show their use of narcotics. *Id.* at 95. Under those circumstances, we held that the officer could not have formed a reasonable suspicion justifying further detention:

We agree with Betow that Steffe's knowledge that "some people" may regard a representation of a mushroom as an emblem of their use of hallucinogens is inadequate to support Betow's continued detention in this case – especially when, at the time he made the decision to extend the detention, Steffes had absolutely no evidence that Betow was "using" hallucinogenic or other drugs on the evening in question (or at any other time).

Id.

¶11 Similarly, Blanke testified at the suppression hearing that latex gloves are utilized by "some" narcotics users. This purported knowledge was inadequate to support Deffke's continued detention. Blanke also conceded Deffke did not appear intoxicated or under the influence at the time of the traffic stop. Additionally, we consider the fact that Pasket "was not feeling particularly comfortable with the situation," to be the type of "inchoate and unparticularized suspicion or 'hunch'" condemned in *Terry*. See *Terry*, 392 U.S. at 27.⁵ We therefore disagree with the circuit court that, after issuance of the ticket, further

⁵ The circuit court concluded the frisk of Williams was for weapons. Assuming for the sake of argument that the purpose of the pat down of Williams was in fact for weapons, we discern no reasonable justification for opening the cigarette pack.

reasonable suspicion evolved justifying Deffke's continuous detention and his subsequent arrest.

¶12 Finally, we note an officer's training and experience is "one factor in the totality of the circumstances that courts can take into account in deciding whether there is reasonable suspicion to make the stop." *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997). However, the "basis of the police action must be such that it can be reviewed judicially by an objective standard." *Id.* (citation omitted). Blanke testified he was employed with the City of Kiel police department for five years. He was asked at the suppression hearing whether he "had training in identification of drugs and drug paraphernalia." However, he was not questioned concerning the extent of his training or experience, or the foundation supporting his statement that some narcotics users utilize latex gloves.

¶13 We conclude the traffic stop was not ongoing, and Deffke's continued detention exceeded the scope of the circumstances justifying a valid stop. Deffke's arrest and his subsequent statement were also not reasonably related in scope to the circumstances justifying a valid stop. The derivative evidence should have been suppressed in violation of Deffke's Fourth Amendment rights.⁶

⁶ The State argues Deffke lacks standing to challenge the search of Williams' vehicle. The State notes Deffke's counsel conceded at trial he did not have a constitutional expectation of privacy in the interior of Williams' car. *See State v. Dixon*, 177 Wis. 2d 461, 501 N.W.2d 442 (1993). However, as a passenger in the stopped vehicle, Deffke had standing to challenge police conduct during the stop that violated his Fourth Amendment rights. *See State v. Harris*, 206 Wis. 2d 243, 255-56, 557 N.W.2d 245 (1996). The State does not attempt to address *Harris* in its brief.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.32(1)(b)5.