

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 19, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1918-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

**PEDRO P. AVILA,
a/k/a PEDRO P. AVILE,**

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Pedro P. Avila has appealed from a judgment convicting him of one count of burglary in violation of § 943.10(1), STATS., and from an order denying his motion for postconviction relief. The sole issues on appeal are whether law enforcement officers conducted a proper investigatory stop of a vehicle occupied by Avila and two other men, and whether the police had probable cause for their arrest of Avila. Because we conclude that the trial court properly found reasonable grounds for the investigatory stop and probable cause for the arrest, we affirm the judgment and the order.

In reviewing the trial court's rulings on these issues, we will uphold its findings of fact unless they are clearly erroneous. *State v. Turner*, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). However, we independently review questions of constitutional fact, applying the constitutional principles involved to the facts as found by the trial court. *Id.* at 344, 401 N.W.2d at 832.

An investigative stop of a motor vehicle is a seizure within the meaning of the Fourth Amendment. *State v. Guzy*, 139 Wis.2d 663, 672, 407 N.W.2d 548, 552-53 (1987). A police officer may make an investigative stop prompted by his or her suspicion that the occupants have committed a crime, even though the officer lacks probable cause to arrest. *Id.* at 675, 407 N.W.2d at 554. However, the suspicion must be grounded in specific, articulable facts and reasonable inferences from those facts. *Id.* The reasonableness of the stop depends upon the facts and circumstances present at the time of the stop. *Id.* at 679, 407 N.W.2d at 555.

Reasonable grounds existed for the stop which occurred here. The undisputed evidence indicated that on October 7, 1993, detectives from the Rock County Sheriff's Department began surveillance in Milwaukee of a brown Dodge cargo van with tandem wheels. The van was parked in front of Avila's residence. The detectives testified that the van was under surveillance because a van matching its description and bearing the same license number had been seen late at night parked near the scene of a burglary that occurred in Rock county on October 1, 1993. In addition, a van with the same license number had been seen by police in late September 1993 near a truck stop area where thieves broke into several semi-trailers.

The detectives testified that when they began investigating the license number of the van, they discovered that it was registered to a person named "Miguel A. Rivera" at a nonexistent address. Subsequently, Milwaukee police informed them that they had had several contacts with the van and that Avila had been driving it. Based on this information, the detectives went to Avila's residence and observed the van parked outside. They testified that they subsequently returned and commenced surveillance of the van outside Avila's residence on the evening of October 7, 1993, and followed the van when it was driven away from the residence at approximately 10:00 p.m. They testified that at approximately 11:30 p.m. it arrived in the area of Old Ashippun in Dodge county, where it stopped along the edge of the road. The detectives testified

that the area in which it stopped was primarily rural, but near a small industrial park. They testified that the van remained parked for approximately forty minutes and that they were unable to see the occupants or any activity during this time. They further testified that they requested other officers to stop the van after it drove off and that the vehicle was then stopped.

Based on this testimony, the trial court properly determined that the police had reasonable grounds to believe the occupants of the van were involved in a crime and to stop the van to investigate the matter. They were aware that the van had been seen parked at night at the location of other burglaries or thefts and that it was registered to a fake address. They observed it driven at night from Milwaukee to another county and observed it stop in an area which was essentially rural, where it was parked in the dark on the side of the road near an industrial park, with no apparent explanation for its activities. Based on these facts, it was reasonable for the police to suspect that the occupants parked it there for purposes of committing or attempting to commit another burglary. They therefore reasonably stopped the van to question the occupants and seek an explanation for their activities.

The police also had probable cause for their arrest of Avila. Probable cause exists for an arrest when the evidence would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). Avila contends that probable cause was lacking because he was arrested as soon as he exited the van and before the police discovered any additional evidence to support a finding of probable cause. He bases this argument on evidence that at the time of the stop, the police had their guns drawn, handcuffed him and placed him in the back of a squad car. He also cites testimony by Sergeant Robert Truttschell at the postconviction hearing indicating that immediately upon removing Avila from the van, he informed Avila that he was under arrest.

An investigative stop is not transformed into an arrest merely because the police have their guns drawn when they stop the vehicle. *State v. Washington*, 120 Wis.2d 654, 662, 358 N.W.2d 304, 308 (Ct. App. 1984), *aff'd*, 134 Wis.2d 108, 396 N.W.2d 156 (1986). Similarly, handcuffing alone does not convert an investigative stop into an arrest. *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983); *see also State v. Swanson*, 164 Wis.2d 437, 448, 475 N.W.2d 148, 153 (1991). Here, the detectives

had been informed by the Milwaukee police that Avila had an extensive criminal history, including violent acts. It was reasonable to believe that he would be driving the van because he had been driving it during contacts with the Milwaukee police and it had been parked at his residence. In addition, the police were stopping the van at night, they believed that it had been involved in multiple burglaries and they were unsure how many people were in the van. Under these circumstances, drawing their guns and placing the occupants in handcuffs and squad cars for questioning was reasonable and did not convert the stop into an arrest. Cf. *Washington*, 120 Wis.2d at 661-62, 358 N.W.2d at 307-08.

Evidence also indicated that when the occupants were placed in the squad cars, one of them informed a detective that Avila left the van to burglarize a building while it was parked near Old Ashippun.¹ This information, in conjunction with the detectives' observations of the van on the night of the stop and their knowledge concerning its prior history, provided probable cause to arrest Avila.

We reject any argument that we are precluded from considering any information obtained after Avila exited the van based on Truttschell's testimony that he told Avila he was under arrest. Initially, it is not clear from Truttschell's testimony whether he told Avila that he was under arrest before or after his companion inculpated him. We note that Rock County Sheriff's Detective Gary Schieve testified that Avila was placed under arrest after his companion inculpated him.

Even if Truttschell incorrectly told Avila that he was being arrested rather than temporarily detained for questioning as he exited the van, we have already determined that the police acted reasonably in stopping the vehicle and temporarily detaining Avila. The inculpatory information was obtained from Avila's companion during the time the van's occupants were properly subject to temporary investigative detention and questioning. Because

¹ Testimony regarding the information provided by Avila's companion was given at a hearing on a motion to suppress evidence held in Dodge county in a related case against Avila. Defense counsel filed the transcript of that hearing in the record in this case during pretrial proceedings. Both the State and Avila cite to it in their briefs on appeal. We therefore have considered it in deciding this appeal.

that information provided probable cause to believe Avila had committed a crime and because it was not obtained as the fruit of an illegal seizure of Avila or his companions, we conclude that Avila was properly taken into custody. We therefore discern no reason for disturbing the judgment of conviction or the order denying postconviction relief.

By the Court. – Judgment and order affirmed.

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