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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2012AP1137-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EUGENE L. CHERRY,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE AND A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE TODD K. MARTENS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

TABLE OF CONTENTS

Page

Cases

Page

Page

Statutes

Other Authorities

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The issues are fully presented in the briefs and may be resolved by application of established law.

STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Defendant-appellant Cherry's recitation of the facts is largely accurate but incomplete. The relevant facts, including those not provided in Cherry's brief, will be presented in Section C. of the Argument to follow.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED CHERRY'S SUPPRESSION MOTION.

A. Introduction.

On appeal, Cherry challenges the trial court's denial of his motion to suppress evidence obtained following his warrantless detention by officers. As best the State can determine, Cherry appears to make the following arguments in the final three paragraphs of the Argument section of his brief: (1) law enforcement officers lacked reasonable suspicion to stop Cherry as he was "merely walking down the road" and not "engaging in any suspicious activity" (Cherry's br. at 8); (2) even if officers had reasonable suspicion to stop Cherry, the show of force by officers transformed the stop into an arrest that was not supported by probable cause (Cherry's br. at 9); and (3) officers stopped and arrested Cherry and his co-defendant, Steven Turner, based on the suspects' race alone (Cherry's br. at 8-9). As developed in Section C. of this brief, the State addresses these arguments as follows.

First, officers had probable cause to arrest Cherry for the burglary based on the objective facts known to them at the time they made contact with Cherry and Turner. These objective facts demonstrate that Cherry was not detained because of his race.

Second, alternatively, even if officers initially lacked probable cause to arrest, they had reasonable

suspicion to stop and temporarily detain Cherry at the time. The manner in which they executed the stop was reasonable under the circumstances, and did not transform the temporary stop into an arrest. Almost immediately thereafter, and before the suspects were transported from the scene, the reasonable suspicion justifying the stop ripened into probable cause to arrest when officers received a matching, detailed description of the suspects.

B. General Legal Principles and Standard of Review.

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution guarantee Wisconsin citizens freedom from unreasonable searches and seizures.[1] When a police seizure of a person occurs in a public place, the warrant requirement of the Fourth Amendment does not apply. *See State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187; *State v. Griffith*, 2000 WI 72, ¶ 26, 236 Wis. 2d 48, 613 N.W.2d 72. Such an action is evaluated under the Fourth Amendment's general prohibition against unreasonable searches and seizures. *Griffith*, 236 Wis. 2d 48, ¶ 26.

To pass the constitutional test of reasonableness, an arrest must be based on probable cause. *See State v. Secrist*, 224 Wis. 2d 201, 208-09, 212, 589 N.W.2d 387 (1999). Probable cause to arrest is the quantum of evidence known to police at the time of arrest "which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *Id.* at 212. Probable cause does not mean "'more probable than not'" and will be found where the information could "'lead a reasonable police officer to believe that guilt is more than a possibility.'" *State v.*

[1]As a general rule, the Wisconsin Supreme Court's interpretation of Article I, § 11 of the Wisconsin Constitution conforms with the United States Supreme Court's interpretation of the Fourth Amendment. *State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187.

Koch, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993) (citation omitted).

When probable cause does not exist for an arrest, police may nonetheless make a temporary investigative stop of a person pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), if they have reasonable suspicion grounded in specific, articulable facts and reasonable inferences drawn from those facts that the individual is committing, has committed or is about to commit an offense.[2] *See State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). "Reasonable suspicion" is more than a hunch, but it is "a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000). A *Terry* stop is a "seizure" for Fourth Amendment purposes. *See State v. Young*, 2006 WI 98, ¶¶ 18, 20, 294 Wis. 2d 1, 717 N.W.2d 729.

For a *Terry* stop to be reasonable, the duration and intrusiveness of the stop must be reasonable under the circumstances. *See State v. McGill*, 2000 WI 38, ¶¶ 38-39, 234 Wis. 2d 560, 609 N.W.2d 795; *State v. Morgan*, 2002 WI App 124, ¶ 14, 254 Wis. 2d 602, 648 N.W.2d 23. A temporary investigatory stop should last "no longer than is necessary to effect the purpose of the stop." *State v. Gruen*, 218 Wis. 2d 581, 590, 582 N.W.2d 728 (Ct. App. 1998) (citations and internal quotation marks omitted). The use of handcuffs or other restrictive measures do not necessarily render a temporary detention unreasonable. *See State v. Vorburger*, 2002 WI 105, ¶ 64, 255 Wis. 2d 537, 648 N.W.2d 829; *McGill*, 234 Wis. 2d 560, ¶¶ 38-39; *State v. Guy*, 172 Wis. 2d 86, 96-97, 492 N.W.2d 311 (1992).

[2]Contrary to Cherry's unusual suggestion, a *Terry* stop does not also require "probable cause that [the person is] armed and dangerous" (Cherry's br. at 6). *See Terry v. Ohio*, 392 U.S. 1, 19-27 (1968); *State v. Richardson*, 156 Wis. 2d 128, 138-139, 456 N.W.2d 830 (1990).

Probable cause and reasonable suspicion are "objective" standards, and are measured by the totality of the circumstances within the officer's knowledge at the time. *See Koch*, 175 Wis. 2d at 701; *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). An arrest or temporary investigative stop may be based on facts not directly observed by officers on the scene but known within the police department. *State v. Rissley*, 2012 WI App 112, ¶ 19, 344 Wis. 2d 422, __ N.W.2d __. "[U]nder the collective knowledge doctrine, the police force is considered as a unit and where there is police-channel communication to the arresting [or investigating] officer and he acts in good faith thereon, the arrest [or stop] is based on probable cause when such facts exist within the police department." *Id.* (internal quotations marks omitted).

When reviewing an order granting or denying a suppression motion, this court must uphold the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106. The determination of probable cause to arrest or reasonable suspicion for a temporary investigative stop is a question of law that is reviewed de novo. *Id. State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

C. The Officers' Detention of Cherry was Reasonable.

1. The Facts and the Circuit Court's Ruling.

At the suppression hearing, the State called two witnesses, Washington County Sheriff's Deputy Ronald Rewerts and Sheriff's Detective James Wolf (26:4; 18-19). Cherry did not call any witnesses.

Hearing Testimony

Deputy Rewerts testified as follows at the hearing. On November 29, 2010, the deputy was on patrol when he

received a dispatch call at 11:13 a.m. regarding a report of suspicious activity at a residence on County Highway W in the Town of Addison (26:5-6). A neighbor had observed that a suspicious car had backed into the driveway of the residence, and two black males had got out and gone behind the residence (26:7). A female had remained in the car (26:7).

The deputy arrived at the residence, and noticed the car backed into the driveway, its trunk left partially open, and a woman sitting in the car (26:8). The deputy made contact with the woman, who confirmed that the other suspects had gone to the back of the residence (26:8-9). The deputy went behind the house and observed that the rear door to the garage "had been forcibly opened with substantial physical damage to the door frame" and door mechanism, parts of which were strewn about on the concrete patio behind the garage (26:9). The deputy learned from dispatch that the property owner had been contacted, and had told police that there were firearms in an unlocked case in the basement of the residence (26:10). The deputy did not know at the time whether the suspects were still inside, or if they had exited the house (26:15-16).

Detective Wolf testified as follows. At around noon on November 29, 2010, the detective responded to a radio call about a burglary in progress at a residence on Highway W in the Town of Addison. The detective drove his unmarked minivan to a set of railroad tracks east of the residence because he believed, based on his experience as an officer, that the suspects probably fled the scene when the police arrived (26:20-23). Having grown up in the area, the detective was familiar with the local topography, and believed the suspects may have escaped into a wooded, swampy area to the east of the residence (26:20-24). From his squad computer, the detective learned of the initial citizen call about the suspicious car, and the presence of two black males behind the residence (26:22). The detective also learned that there were unsecured firearms in the residence (26:25).

A radio call informed all squads that dispatch had received a report from a second resident that two unfamiliar-looking men, one black and the other Hispanic, were observed walking in the 6000 block of Wildlife Drive, approximately one mile east of the residence (26:26). The second resident spotted the men as they were cutting through "a side yard or neighbor's yard" (26:26).

The detective responded to the call, and eventually observed, from a distance of at least thirty feet, two individuals from behind walking south on Wildlife Drive (26:27, 34). The detective saw that the man later identified as Cherry was wearing a black jacket and black jeans, which appeared to be wet below the knees (26:28). The detective saw that the man later identified as Turner was wearing a black jacket and lighter-colored blue jeans, which were wet and muddy below the knees (26:28). From the condition of the suspects' jeans, the detective concluded that the men had probably walked through the swamp area between the residence and Wildlife Road (26:29). At his distance from the suspects, the detective could tell that Turner, who had dark-colored skin, was black, but could not determine Cherry's race, who had lighter-colored skin (26:40).

A lieutenant from the Hartford Police Department and a Sheriff's Department sergeant had also responded to the call (26:30). The lieutenant and sergeant stopped their marked vehicles a little ahead of the detective's minivan, and all three officers got out of their vehicles to approach the suspects from behind (26:30). From a distance of at least thirty feet, the lieutenant drew his gun and directed the men to get down on the ground (26:30, 34). At least one other officer had drawn his gun (a "long gun") as well (26:40). The suspects complied, and lay down on the ground (26:34).

The detective approached Cherry and put him in handcuffs and patted him down for weapons (26:30). The lieutenant did the same with Turner (26:30). No weapons

were found, and the suspects were placed in separate squad cars (26:31-32).

Then, before leaving the scene, the detective contacted a Detective Abbott, who was at the residence and had interviewed the female suspect (26:31). Detective Abbott relayed the female suspect's detailed description of the two men who had driven to the residence with her. One was a five foot, six inch, 150 to 155 pound black male, approximately 35 years of age, wearing a black jacket and black pants (26:31). The other was a six foot, 200 pound black male wearing a black jacket and black jogging pants (26:31).

The Circuit Court's Ruling

In denying Cherry's suppression motion, the court relied on the testimony of Deputy Rewart and Detective Wolf at the hearing, accepting it as true.

In its oral ruling, the court initially proceeded on the assumption that the detention began as a temporary investigative stop, and addressed whether the manner in which the officers executed the temporary stop was reasonable under the circumstances (26:53-55). The court concluded the officers' tactics in this case—drawing their guns and ordering the suspects to get on the ground, and handcuffing the suspects prior to performing a pat-down for weapons—were reasonable where the victim homeowner had said that he kept unlocked guns in the residence (26:53-55).

The court addressed the various objective facts known to the officers and concluded that reasonable suspicion existed for a stop (26:55-56). The court stated that, in assessing whether a legal basis existed for the detention, the officers could assign significant weight to the fact that the race of the two men spotted on Wildlife Drive roughly matched the reported race of the suspects

because there were so few persons of that race in Washington County:

> You know, the obvious and undisputed ethnicity of Washington County is overwhelming Caucasian. We all know that. There is nothing wrong with saying that; there is nothing wrong with the detectives and deputies and lieutenants who were investigating that considering that. A person—an African-American in Washington County, or if you see—if you report suspicious activity by African-Americans in Washington County, there simply aren't many African-Americans in Washington County. So, if you see two African-Americans in Washington County and have that information, it certainly is reasonable to, you know, consider that. And that was done here as well.

(26:56). The court also addressed the fact that the second caller had said that one of the men was Hispanic and the other was African American (26:54). Upon observing Cherry and Turner in the courtroom, the court found that Cherry was a lighter-skinned person of color, and that Turner had much darker skin, and that "a reasonable person could easily, easily conclude, based on a brief observation" that Cherry is Hispanic and Turner is African American (26:54).

The circuit court later also concluded that, even if the manner in which detention was executed was unreasonable for a temporary investigative stop under the circumstances, the objective facts and reasonable inferences drawn from those facts were strong enough in this case to give officers probable cause to arrest Cherry and Turner at the time of the initial detention (26:61-62).

2. Probable Cause Existed to Arrest Cherry When Officers Detained Him.

As noted, Cherry appears to argue that his detention was not supported by reasonable suspicion for a temporary investigative stop, or by probable cause for a

full-blown arrest (Cherry's br. at 8-9). Based on the undisputed hearing testimony, and the circuit court's findings of fact, the State submits that the objective facts and the reasonable inferences drawn from those facts gave officers probable cause to arrest Cherry when he was spotted walking with Turner on Wildlife Road.

The following facts were known to Detective Wolf and other law enforcement participating in the investigation and in contact with each other through the dispatcher.

From his squad computer, Detective Wolf learned that a citizen had reported that a suspicious car was backed into her neighbor's driveway, and that two black men had exited the car and gone behind the house, while a woman remained in the car (26:6-7, 22). The details of this call were verified by Deputy Rewarts, who arrived at the scene and found a car backed into the driveway, and received confirmation from the woman that the two men had gone to the back of the residence (26:8-9). The deputy also noticed that the trunk of the vehicle was popped open, and discovered that the rear door to the garage was damaged with parts of the door mechanism strewn on the ground (26:8-9). Based on these objective facts, there was probable cause to believe that a burglary or attempted burglary had occurred at the residence, and that two black men were involved.

Soon after, Wolf learned via dispatch that a second caller had reported seeing two unfamiliar men, one black and the other Hispanic, cutting through a lawn and then walking on Wildlife Drive (26:26). From a distance of at least 30 feet, the detective later spotted the two men walking on Wildlife Drive (26:34). The detective saw that the pants worn by one of the men were wet below the knees, while the other man's pants were wet and muddy below the knees (26:28-29). An area native, the detective knew that a swampy, wooded area lay between the residence and Wildlife Drive, and drew the reasonable inference that the two men had recently walked through

the swamp (26:24, 29). The detective had estimated that the men were about one mile from the residence (26:29), and could reasonably determine that, from the initial 11:13 a.m. report of suspicious activity (26:5) to the present moment (sometime after noon, (26:20)), the men had sufficient time to cover the distance from the residence to Wildlife Road.

The detective could tell from where he was standing that one of the men was black, but could not determine the race of the other man, whether Hispanic or black (26:40). As noted, the court found that Cherry is a lighter-skinned African American, and that a reasonable person could conclude from a distance that Cherry was Hispanic (26:54).

Based on the foregoing, probable cause existed to believe that the man later identified as Cherry was involved in the burglary or attempted burglary at the residence. Upon spotting the men walking on Wildlife Drive, pants wet up to the knees (and muddy in Turner's case), officers drew the entirely reasonable inference that, in the hour or so since the suspected burglary, the men had fled the residence and walked through the swamp lying between the residence and Wildlife Drive. The men, as the circuit court noted, were not out "walking the dog on the road" (26:57). Neither were they wearing attire or carrying gear suggesting they had been hunting or birding in the nearby swamp. Rather, they were wearing mostly dark clothing associated with burglars, and were seen cutting through a yard before taking to the road. From a distance of at least 30 feet, the detective had a match on the suspects' race—he could tell that one man was black (Turner) and the other had lighter skin, and thus could have been either black, as the first caller stated, or Hispanic, as the second caller indicated. When the officers found two men matching the racial description of the suspects who appeared to have recently emerged from the adjacent swamp, the fact that no one else was seen walking in this rural area made it even more likely that Cherry and Turner were their suspected burglars. *See*

State v. Flynn, 92 Wis. 2d 427, 434, 285 N.W.2d 710 (1979) (fact that no one else was on the street in area of suspected crime was relevant to whether legal basis existed for detention).

Taken together, these facts and reasonable inferences were sufficient for officers to have probable cause to believe that Cherry was involved in the suspected burglary of the residence.

These facts also demonstrate that Cherry was not, as he argues, detained simply because he is African American. He was lawfully detained because the totality of the circumstances—which included that he and Turner appeared to have just been walking through the swamp between the residence and the road, and that his race (and Turner's) roughly matched the description given by the two callers—gave officers probable cause to believe that he was involved in the suspected burglary.

Cherry suggests that he was "merely walking down the road" when he was detained by the officers (Cherry's br. at 8). Cherry did not testify at the suppression hearing, and does not suggest here why his pants were wet below the knees if he wasn't in the swamp, or what he may have been doing in the swamp if not fleeing the crime scene. Perhaps Cherry and Turner were just walking down the road after taking a recreational hike in the swamp. But officers were not required to reach this conclusion. Where the facts supported a reasonable inference that Cherry was probably involved in the crime, officers were entitled to rely on that inference in arresting him. *See State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125.

Accordingly, this court should affirm on grounds that probable cause existed to arrest Cherry when he and Turner were spotted walking on Wildlife Road approximately one hour after the suspected burglary.

3. Alternatively, Reasonable Suspicion Existed to Stop Cherry, and the Precautions Taken by Officers in Executing the Stop Were Reasonable Under the Circumstances.

If this court concludes that the officers did not have probable cause to arrest Cherry, it must conclude that they had reasonable suspicion to temporarily detain him. To avoid repetition, the State refers the court to Section C.2. above and submits that, if the objective facts and reasonable inferences drawn from those facts set forth therein are insufficient to constitute probable cause to arrest, they are more than adequate to constitute reasonable suspicion to temporarily detain Cherry.

If this court concludes that officers had only reasonable suspicion to temporarily stop Cherry, it must address Cherry's argument that the manner in which police executed the stop turned it into an arrest that was not supported by probable cause. Cherry actually seems to make two distinct arguments in this area, both of which are based on misreadings of the law.

First, Cherry asserts that a person is "under arrest" when he or she would reasonably believe that they are not free to leave, and then appears to argue that, because he was not free to leave when officers ordered him to the ground at gunpoint, he was under arrest, and not subject to a *Terry* stop (Cherry's br. at 7, 9). Cherry appears to believe a *Terry* stop is transformed into a full-blown arrest the moment that a person is no longer free to leave. Cherry is mistaken. As discussed below, a person is not free to leave whenever they are seized within the meaning of the Fourth Amendment—whether for a *Terry* stop or an arrest—and the fact that Cherry was plainly not free to

leave is irrelevant to whether the detention was a *Terry* stop or an arrest.

Cherry mistakenly asserts that *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) sets forth the standard for when a person is *arrested* (Cherry's br. at 7). It does not. *Mendenhall* establishes the test for when a person is *seized* within the meaning of the Fourth Amendment, whether by a *Terry* stop or an arrest. *See I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (*Terry* stop is a seizure). Thus, Cherry incorrectly claims that the test for arrest is whether "'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.'" *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *Mendenhall*, 446 U.S. at 554). (Cherry's br. at 7). This is the test for *seizure*, not arrest, as the full quote from *Chesternut* makes clear: "The test provides that the police can be said to have *seized* an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Chesternut*, 486 U.S. at 573 (quoting *Mendenhall*, 446 U.S. at 554) (emphasis added).

Obviously, Cherry was not free to leave when officers ordered him to the ground at gunpoint; he was seized at that time within the meaning of *Mendenhall*.[3] But that does not answer the question of whether the precautions used by police in executing the stop were reasonable under the circumstances, or whether they turned the stop into an arrest that was not based on probable cause.

Second, Cherry asserts, without citation to authority, that officers may never draw their weapons and order a suspect to the ground, use handcuffs, or place a

[3]Actually, to be more precise, Cherry was seized the moment he got down on the ground as ordered by the lieutenant. *See State v. Young*, 2006 WI 98, ¶ 26, 294 Wis. 2d 1, 717 N.W.2d 729 (seizure occurs when person complies with an officer's show of authority).

suspect in a police car in conducting a *Terry* stop (Cherry's br. at 7).[4] Cherry is wrong. Use of handcuffs does not necessarily transform a *Terry* stop into an arrest. *McGill*, 234 Wis. 2d 560, ¶¶ 38-39; *Guy*, 172 Wis. 2d at 96-97. Neither does the drawing of guns by police. *See Jones v. State*, 70 Wis. 2d 62, 70, 233 N.W.2d 441 (1975); *United States v. Lechuga*, 925 F.2d 1035, 1040 (7th Cir. 1991). Similarly, officers may order a person to the ground at gunpoint during a *Terry* stop when circumstances warrant. *United States v. Tilmon*, 19 F.3d 1221, 1227-28 (7th Cir. 1994); *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) (noting that nine federal circuits have held that ordering suspect to ground at gunpoint does not necessarily transform *Terry* stop into an arrest). Finally, a handcuffed suspect may be briefly placed in the back of a squad car without necessarily transforming a *Terry* stop into an arrest. *See United States v. Bullock*, 632 F.3d 1004, 1016 (7th Cir. 2011) (reasonable for officers to place handcuffed suspect in back of squad car even though officers did not find weapons in pat-down); *but see State v. Pickens*, 2010 WI App 5, ¶¶ 29-33, 323 Wis. 2d 226, 779 N.W.2d 1 (handcuffing and placing suspect in back of car unreasonable under the circumstances of case). In assessing the reasonableness of these precautions, the focus of the inquiry is on whether a reasonable officer would believe such measures were necessary for the protection of the officer and others. *See Bullock*, 632 F.3d at 1014-1016.

The State respectfully submits that the precautions taken by officers were reasonable under the circumstances. The officers had reason to suspect that Cherry and Turner were armed when the officers came upon the men, based on their knowledge that the burglarized residence contained unsecured guns (26:25, 53). This knowledge justified drawing their guns. "Where

[4]From an officer-safety perspective, this is an interesting position to take, particularly given Cherry's prior (incorrect) assertion that officers must have "probable cause that [the person is] armed and dangerous" to even make a *Terry* stop (Cherry's br. at 6).

the suspect is thought to be armed, or even when he is thought to be involved in criminal activity in which the use of weapons is a commonplace, police may protect themselves by displaying their weapons." *Lechuga*, 925 F.2d at 1040. "[T]he use of guns in connection with a stop is permissible where the police reasonably believe [the weapons] are necessary for their protection." *United States v. Merritt*, 695 F.2d 1263, 1273 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983). Likewise, officers were permitted to order the suspects to the ground in these circumstances. "When a suspect is considered dangerous, requiring him to lie face down on the ground is the safest way for police officers to approach him, handcuff him and finally determine whether he carries any weapons. Thus, a 'lying prone' requirement may be within the scope of an investigative detention." *Tilmon*, 19 F.3d at 1228 (internal citations omitted). Once officers made contact with Cherry and Turner, it was reasonable for them to place the men in handcuffs prior to conducting a pat down for weapons.[5] *See McGill*, 234 Wis. 2d 560, ¶¶ 38-39 (use of handcuffs before conducting pat-down is reasonable where police believe subject is armed); *Guy*, 172 Wis. 2d at 96-97.

A closer issue in this case may be whether it was reasonable to place the handcuffed Cherry in a squad car after the pat-down for weapons. This court has held that it was unreasonable for police to place in the back of a squad car a handcuffed suspect who appeared to be

[5]Detective Wolf also acquired more information upon coming into close contact with Cherry—and before handcuffing and placing him in the back of the squad car—that would be relevant to a probable cause to arrest analysis. Namely, he was able to determine upon close range that Cherry was, indeed, a light-skinned African American, matching the first caller's description of his race (26:40). Further, he noticed that Cherry's pants, like Turner's, were covered in mud, strengthening the inference that both men had recently fled the crime scene and walked through the swamp to the road (26:29). The State submits that, if this court concludes that officers lacked probable cause to arrest upon spotting Cherry from a distance, the additional information they acquired when they got closer to him gave them probable cause to arrest.

unarmed and was generally cooperative. *See Pickens*, 323 Wis. 2d 226, ¶¶ 29-33. However, the State submits that this case is distinguishable from *Pickens*, and police were justified in placing Cherry in a squad car for the following reasons. First, the risk of flight was substantial where both men were reasonably suspected of having just fled a crime scene, and the risk of escape in the middle of a rural, wooded area was real. By contrast, Pickens was stopped when he was found sleeping in the parking lot of a hotel in the city of Madison. *Id.* ¶ 5. Second, the men were picked up on a road, and placing the suspects in the squad car was reasonable to protect the suspects from oncoming traffic. Third, here, unlike *Pickens*, there were two suspects, and they needed to be separated for police to effectively conduct the investigation. Placing the men in separate squad cars achieved this objective.

Regardless, even if it was unreasonable for officers to place Cherry in the squad car under the circumstances, officers certainly obtained probable cause to arrest Cherry (if they did not have it before) almost immediately thereafter when Detective Wolf called Detective Abbott and received a detailed physical description of the suspects (26:31). Detective Abbott had acquired a matching description of height and weight of the suspects, their race, their clothes, and Cherry's approximate age (26:31).[6] The suspects had yet to be transported from the area when this additional information providing probable cause to arrest was obtained by Detective Wolf.

Assuming that it was unreasonable to place Cherry in the back of the squad car, no evidence was obtained from Cherry that advanced the investigation in the moments that he sat in the car before the detective received the matching physical description of the men. And here, the very short length of Cherry's detention before probable cause was found to exist to arrest him

[6]The only part of this description that did not quite fit was that of Turner's pants—Turner was wearing blue jeans, whereas the description had him in black jogging pants (26:28, 31). This minor inconsistency is insufficient to undermine probable cause.

(again, assuming it did not exist previously) was reasonable. Under these circumstances, the State submits that the evidence should not be suppressed. *See Bullock*, 632 F.3d at 1017 (holding that, even if the *manner* of the seizure was overly intrusive, evidence would not be suppressed where the *length* of the suspect's detention was reasonable and officers "would have inevitably arrested" him after additional evidence was obtained shortly thereafter).

Again, this court need not answer the question of whether the precautions taken by police were reasonable under the circumstances if this court agrees with the State's argument in Section C.2. that probable cause existed to arrest Cherry when he was spotted walking with Turner one mile from the crime scene. However, if this court concludes that police had only reasonable suspicion to stop Cherry, the State submits based on the analysis above that the safety measures used by police were reasonable under the circumstances, and thus the temporary seizure was legal.

CONCLUSION

Based on the foregoing, the State submits that the circuit court's order denying Cherry's motion to suppress, as well as his judgment of conviction, should be affirmed.

Dated this 21st day of December, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,399 words.

Dated this 21st day of December, 2012.

_____
Jacob J. Wittwer
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of December, 2012.

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Jacob J. Wittwer
Assistant Attorney General