STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP353-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS J. ANKER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR SHAWANO COUNTY, THE HONORABLE JAMES HABECK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

INTRODUCTION

Thomas Anker entered pleas of no contest to charges of OWI (6th offense), OWI causing injury (second or subsequent offense), hit and run involving injury, and operating while revoked (37; 38). The charges were based on a midday traffic accident in Shawano in November 2011, in which a suspect crashed his car into another vehicle, injuring the other vehicle's driver (4:6).

Shortly after the accident but before police arrived, the suspect ran away from the scene of the crash into nearby woods (4:6-8). A state conservation warden, James Horne—who was near the site of the crash and heard details of the crash over dispatch—discovered the suspect and briefly detained him before police arrived to continue their investigation of the crash (47:4-14). The suspect was later identified as Anker.

In circuit court, Anker filed a motion to suppress the evidence that police gathered after Warden Horne detained him, arguing that Warden Horne arrested him when he stopped him but lacked probable cause to support that arrest (15:3). After a hearing, the circuit court denied that motion (47:109-10).

Anker's sole argument on appeal is that the circuit court properly "found" that Warden Horne arrested him when he stopped him, but that the court erred in concluding that probable cause supported that arrest.

Anker is not entitled to relief. Warden Horne's temporary detention of Anker was a *Terry* stop that was supported by ample reasonable suspicion under the circumstances.

Additional facts will be discussed in the Argument section of this brief.

ARGUMENT

The circuit court properly denied the motion to suppress because Warden Horne had reasonable suspicion to detain Anker.

On appeal, Anker frames the issue as one of probable cause, i.e., whether Warden Horne had probable cause to arrest Anker (Anker's br. at vi). But probable cause is not the standard under the circumstances. Rather, the real question is whether Warden Horne had reasonable suspicion to stop and detain Anker where (1) Horne was aware that a nearby accident had occurred and that a suspect involved in the accident had fled the scene; (2) Horne understood that the suspect had run into nearby woods, was wearing a white shirt, and was bleeding from his head; (3) Horne saw the suspect, i.e., Anker, who was bleeding from his head, leaving the woods, and wearing a white shirt; and (4) when Horne approached Anker and asked him to stop, Anker began walking faster away from Horne.

Under the circumstances, there was ample reasonable suspicion for Horne to have done what he did, which was to freeze the situation and temporarily detain Anker until the Shawano police arrived to investigate the matter. Accordingly, there was no illegality that would have required suppression of evidence under *Wong Sun*. Hence, this court should affirm.

A. Relevant law and standard of review.

When reviewing the denial of a motion to suppress evidence, the court will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Patton*, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. This court reviews de novo whether the facts establish reasonable suspicion. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729.

An investigatory or *Terry* stop is a "seizure" within the meaning of the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Young*, 294 Wis. 2d 1, ¶20. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Young*, 294 Wis. 2d 1, ¶20. An investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause to support an arrest. *Id.* (citation omitted).

To determine whether a seizure is reasonable, courts first determine whether the initial interference with the detained person's liberty was justified by reasonable suspicion, and then determine whether any subsequent police conduct was reasonably related in scope to the circumstances that justified the original interference. *Terry*, 392 U.S. at 19-20; *State v. Arias*, 2008 WI 84, ¶30, 311 Wis. 2d 358, 752 N.W.2d 748.

In assessing whether reasonable suspicion justifies an officer's initial intrusion, courts consider whether the "police officer possess[es]

specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶21 (citation omitted). "A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id.* (citing *Terry*, 392 U.S. at 27). However, officers need not eliminate the possibility of innocent behavior before initiating an investigatory stop. *Id.* In other words:

> [I]f any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

State v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). The length of the detention, however, cannot be longer than necessary to clarify the ambiguity. *Young*, 294 Wis. 2d 1, ¶21.

B. Anker matched the description that Horne had heard over dispatch of a person who had been involved in a nearby accident but who had ran from the scene.

Warden Horne testified that on the day of Anker's accident, he was on duty when he overheard police radio dispatch stating that someone had gone into the woods behind a McDonalds with a possible head injury (47:6). After confirming the exact location with dispatch, Horne drove toward the scene (*id.*). He saw several squad cars in the area, so he drove to a nearby road next to the woods described by dispatch and stopped so he had a view of the road (*id.*).

While Horne waited, dispatch provided a description of the suspect as wearing a white T-shirt (47:6). Shortly after, Horne saw a person exit the woods, run across the street Horne was parked on, and enter a lot near a Wal-Mart on the other side of the road (*id.*). Horne told dispatch that he had seen a person matching the suspect's description and that he was going to try to make contact with him (47:7).

Horne drove to the Wal-Mart but he did not immediately see the suspect (47:7). However, while Horne was sitting in the Wal-Mart parking lot, a man approached Horne and told Horne that "he had witnessed the accident and saw the individual running into the woods, and that he had also seen that same person" run across the road toward the Wal-Mart (*id.*). The man asked Horne if he was looking for the suspect, and Horne said that he was (*id.*).

After the man gave Horne that information, Horne saw Anker come out of the woods (47:8). Horne could see that Anker was wearing a white T-shirt, that he had no shoes, and that he was bleeding from his head (*id.*). Anker began walking to the south away from Horne (*id.*).

Horne got out of his truck, walked up behind Anker, and told him that he should stop (47:9). Anker "kind of turned around and walked a little faster" away from Horne, moving approximately five to eight feet (47:9, 14). Horne told Anker that he was "under arrest" and again told him to stop (47:9). Anker complied (*id.*). Horne put Anker in handcuffs and told him, "[L]et's just wait for the officers to arrive" (*id.*).

Horne took Anker back to his truck and called dispatch to tell it that he had detained a person matching the suspect's description in the Wal-Mart parking lot (47:10). Horne did not recall talking to Anker much other than to ask him "why he was bleeding and running around in the woods without his shoes on a cold November day" (*id.*). Anker said that he had fallen in the woods (*id.*).

Officer Dan Conradt of the Shawano Police Department then arrived and took custody of Anker (47:11, 20-21). Officer Conradt and other officers then completed the investigation that ultimately led to the charges against Anker.

C. Horne's seizure of Anker was a *Terry* stop, not an arrest, and was supported by reasonable suspicion.

Horne's seizure of Anker had all of the earmarks of a reasonable *Terry* stop: Horne understood that a person involved in a nearby accident had run from the scene of the accident into woods. Horne saw a person matching the suspect's description leave the woods. Horne approached the person, i.e., Anker, and asked him to stop. When Anker did not stop, Horne seized him and detained him until police arrived to complete the investigation.

Horne's seizure of Anker was reasonable. *See Terry*, 392 U.S. at 19-20; *Arias*, 311 Wis. 2d 358, ¶30. Anker matched the description of a person suspected to be involved in a car accident, who was possibly injured, and who fled the scene of the accident. Horne observed Anker, who matched the description of the suspect and who was barefoot and bleeding from his head on a cold

November day. Given that knowledge, Horne was justified in approaching Anker and asking him to stop.

When Anker did not stop at Horne's request, Horne's next steps of ordering Anker to stop, handcuffing him, and walking him back to his truck to alert dispatch and wait for the police, likewise were reasonable. When a suspect demonstrates an intention to flee from the police, law enforcement has a right to temporarily freeze the situation to make an investigative inquiry. *Anderson*, 155 Wis. 2d at 88. Horne here did just that: He took reasonable steps to freeze the situation so that Shawano law enforcement could investigate.

Further, Horne's actions did not transform the stop into an arrest.

First, Horne's statement to Anker that he was "under arrest" was simply a show of authority to compel Anker—who appeared to be trying to get away from Horne—to stop. *See United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (a police-citizen encounter becomes a seizure when the law enforcement officer "'by means of physical force or show of authority'" in some way restrains the liberty of the citizen) (quoted source omitted). Significantly more egregious uses of force—all of which would have had the same effect of freezing the situation—have generally been found to have been consistent with a *Terry* stop. *See, e.g.*, *Jones v. State*, 70 Wis. 2d 62, 70, 233 N.W.2d 441 (1975) (an officer's drawing a weapon to effectuate a stop does not necessarily transform it into an arrest); *State v. Goyer*, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990) (an officer may physically restrain a suspect who attempts to walk away

from an investigation). Under the circumstances here, Horne's commands were reasonable ways to freeze the situation.

Second, use of handcuffs does not necessarily transform a *Terry* stop into an arrest. *State v. Swanson*, 164 Wis. 2d 437, 448-49, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277; *see also Tom v. Voida*, 963 F.2d 952, 958 (7th Cir. 1992) (handcuffing justified where suspect was fleeing police and his actions required the measure). Here, Anker responded to Horne's request to stop by hastening away. Horne, also aware that the suspect had fled the crash, reasonably decided that handcuffing Anker was necessary to prevent further evasive actions.

Third, Horne's taking Anker back to his truck, alerting dispatch, and waiting for police to arrive to conduct further investigation was reasonable. Horne needed to alert the Shawano police that he had detained the crash suspect. His radio was in his truck. It would not have made sense for him to leave Anker, walk back to his truck to radio dispatch, then walk back to Anker and simply hope that Anker had not walked off. *Accord State v. Gruen*, 218 Wis. 2d 581, 591, 582 N.W.2d 728 (Ct. App. 1998) (an extra-jurisdictional officer's seizure and brief detention of a suspect until law enforcement with authority to investigate arrived was a reasonable *Terry* stop under the circumstances).

D. The question of whether the stop morphed into an arrest is a red herring.

Anker first asserts that the circuit court found as a matter of fact that Horne arrested Anker when he commanded him to stop and that that finding is "unassailable" on appeal (Anker's br. at 5-6).

Anker's argument distorts the standard of review. Although a circuit court's factual findings are subject to the clearly erroneous standard of review, whether a seizure has occurred—based on the circuit court's factual findings—is a question of law reviewed for errors of law. *Young*, 294 Wis. 2d 1, ¶17. Accordingly, the circuit court's findings that Horne told Anker that he was under arrest, that he put handcuffs on him, and the other facts related to Horne's encounter with Anker are largely unassailable. However, this court owes no deference to the circuit court's erroneous conclusion that Horne's seizure of Anker was an arrest.

As an initial matter, the circuit court's reasoning did not support its conclusion that Horne effectuated an arrest. It noted that even though Horne himself appeared to believe that he was temporarily detaining Anker, Horne's use of the handcuffs, use of the word "arrest," and leading Anker back to his truck told Anker that he was not free to go (47:108-09).

But whether Anker believed he was free to go is not the test of whether an arrest has occurred. In any seizure—whether it is a temporary *Terry* stop or an arrest—the detained

person does not necessarily feel free to go. *See, e.g.*, *Goyer*, 157 Wis. 2d at 538 (suspect in Terry stop does not have the right to "simply walk away" before the investigation is complete). Rather, the test "is whether a reasonable person in the defendant's position would have considered himself or herself to be '*in custody*,' given the degree of restraint under the circumstances. *Swanson*, 164 Wis. 2d at 446-47 (emphasis added). "The circumstances of the situation, including what has been communicated by the police officers[,] either by their words or actions, shall be controlling under the objective test." *Id.*

In determining whether an investigatory detention has escalated into an arrest, courts have considered:

> (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a *Terry* frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved.

Gruen, 218 Wis. 2d at 594-96 (footnotes omitted).

Here, the only above factor present was the use of handcuffs, which, as explained above, was justified based on Horne's reasonable concerns that Anker would flee. Further, even though Horne used an inaccurate word in telling Anker that he was "under arrest," all of the circumstances—i.e., the fact that Horne told Anker that they were going to wait for the police to arrive, the fact that Horne did not engage Anker in interrogation, and the fact that Horne did not place him in a vehicle—support the

conclusion that a reasonable person in Anker's situation would have understood that he was being temporarily held, not in custody on an arrest.

In any event, even if Horne's stop of Anker somehow transformed into an arrest unsupported by probable cause, Anker cannot obtain the relief he seeks. The probable-cause-to-arrest question is a red herring because Horne had reasonable suspicion to detain Anker until the Shawano police arrived. In other words, everything that Horne did here—based on what he understood from dispatch, from the citizen report, and from his own observations—established reasonable suspicion for him to temporarily detain Anker until police arrived or until it became clear that Anker was not the person that the police were looking for.

Thus, the Shawano police would have conducted the same investigation of Anker regardless of whether Horne seized or arrested Anker because Anker was not free to leave either the detention or the arrest. To that end, if Horne improperly arrested Anker, that arrest did not produce any evidence independent of the subsequent police investigation or other "fruits of the poisonous tree" requiring suppression. Rather, all of the evidence of Anker's guilt flowed from the subsequent police investigation—which Anker does not challenge—not from Horne's temporary seizure.

Hence, to accept Anker's position is to endorse the proposition that Horne, seeing Anker walking barefoot and bleeding and otherwise matching the description of an at-large suspect

who fled a nearby car accident, should never have stopped him. That's simply incorrect.

Accordingly, Horne had reasonable suspicion to stop Anker, and Horne's stop was a reasonable *Terry* stop under the circumstances. Nothing about Horne's encounter with Anker required the suppression of evidence that officers obtained later in the investigation. Hence, the circuit court did not err in denying Anker's motion to suppress. This court should affirm.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of the circuit court.

Dated this 9th day of June, 2014.

Respectfully submitted,

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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 2847 words.

_____
Sarah L. Burgundy
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 9th day of June, 2014.

_____
Sarah L. Burgundy
Assistant Attorney General