

RECEIVED

05-27-2020

CLERK OF COURT OF APPEALS
OF WISCONSINWISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2020AP000489-CR

JAMES E. BROWN,

Defendant-Appellant.

On Appeal from the Circuit Court of Milwaukee County, Case No. 2018CM3449,
The Honorable Daniel J. Gabler, Presiding

BRIEF OF DEFENDANT-APPELLANT JAMES E. BROWN

Malinda J. Eskra
WI State Bar ID No. 1064353
meskra@reinhardtllaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Attorneys for Defendant-Appellant
James E. Brown

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW.....	4
ARGUMENT	5
I. The police lacked reasonable suspicion to stop Mr. Brown's vehicle, and all evidence seized subject to that stop should be suppressed.	5
A. Police lacked reasonable suspicion to stop Mr. Brown's vehicle.	5
B. Even if police had reasonable suspicion to initially stop Mr. Brown's vehicle, the stop should have ended when police observed that Mr. Brown did <i>not</i> match the 911 caller's description of the man with a gun.....	6
C. The gun should be suppressed because it was only perceived by officers following an illegal stop.....	7
CONCLUSION	8
FORM AND LENGTH CERTIFICATION.....	9
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12), (13)	10
APPELLANT'S BRIEF APPENDIX CERTIFICATION.....	11
CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY	13
APPENDIX	14
APPENDIX TABLE OF CONTENTS	15

TABLE OF AUTHORITIES

	Page
Cases	
<i>State v. Chambers</i> , 55 Wis. 2d 289, 198 N.W.2d 377 (1972)	5
<i>State v. Dubose</i> , 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582	5
<i>State v. Griffith</i> , 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72	6
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634	6
<i>State v. Richardson</i> , 156 Wis. 2d 128, 456 N.W.2d 830 (1990)	5
<i>State v. Washington</i> , 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305	7
<i>State v. Young</i> , 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729	5, 6
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	5
<i>United States v. Street</i> , 917 F.3d 586 (7th Cir. 2019)	6
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963).....	7
Statutes	
Wis. Stat. § 941.23(2).....	4
Wis. Stat. § 946.41(1).....	4
Wis. Stat. § 968.24	5
Other Authorities	
Fourth Amendment.....	4, 5, 7

STATEMENT OF THE ISSUES PRESENTED

Whether police had reasonable suspicion to stop Mr. Brown, a black male, in a maroon hooded sweatshirt and pants, legally driving his car down a public street, because a 911 caller described a black male wearing a "black hoody and shorts" in the area with a gun, with no mention of a car.

Circuit court's response: Yes.

Whether police had reasonable suspicion to continue seizing Mr. Brown after they discovered he did *not* match the 911 caller's description of the man with the gun.

Circuit court's response: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Brown does not believe oral argument is necessary because the issue raised is discrete and should be adequately addressed by the briefs.

Mr. Brown does not request publication because the issue raised requires only the application of well-established law.

STATEMENT OF THE CASE¹

On October 24, 2018, at approximately 11:18 p.m., Milwaukee police officers were dispatched to a shots-fired complaint at 8940 West Carmen Avenue in the City of Milwaukee. (R. 33:6-7; App. 6-7.) During the 911 call that initiated

¹ Officer Nicholas Schlei testified at the motion to suppress hearing, and the video taken from the body camera he was wearing during his encounter with Mr. Brown was entered into evidence and marked as Exhibit 1. (R. 33:21-25; App. 21-25.) Exhibit 1 was transferred to this Court as part of the record (R. 36), and will be referred to hereafter as "Exhibit 1." Officer Schlei's body camera is the second file in the "Part 2" file folder located in Exhibit 1.

the dispatch, the caller indicated she heard five gunshots in the area and that she had observed "a black male wearing ... a black hoody and shorts" carrying a gun. (R. 33:8-9; App. 8-9.) The caller did not mention a vehicle or provide a vehicle description. (R. 33:21; App. 21.)

Three minutes later, when officers arrived in the area of the complaint, they observed a grey Mazda 3, driving down the street near the area where the shots were fired. (R. 33:12, 21; App. 12, 21.) As officers drove up behind the rear of the Mazda, they used a spotlight in their squad car to illuminate the interior of the vehicle. (R. 33:9, App. 9.) Officers observed that the driver of the Mazda was a black male wearing a dark-colored hooded sweatshirt and that there did not appear to be other occupants in the vehicle. (*Id.*) As the officers pulled up behind the Mazda, the Mazda began braking. (R. 33:24-25; App. 24-25.) The officers then activated the lights on their squad car and stopped the Mazda. (*Id.*)

After the officers stopped the Mazda, Officer Nicholas Schlei approached the driver's side window and illuminated the inside of the vehicle with a flashlight. Mr. Brown was *not* wearing a black-hooded sweatshirt and shorts as the 911 caller had described, but was instead wearing a maroon hooded sweatshirt and pants. (R. 33:13, 26-27; App. 13, 26-27; Exhibit 1 at 0:45-0:52.) Officer Schlei testified that he expressly noted that Mr. Brown was not wearing a "black hoody" as described by the 911 caller, (*id.*), and the fact that Mr. Brown was wearing pants, rather than shorts, is readily visible on Officer Schlei's body cam, (*id.*).

While standing at the driver's side of the vehicle, Officer Schlei observed that the driver's side window was rolled down approximately one inch. (R. 33:14; App. 14.) Officer Schlei asked Mr. Brown to roll the window down completely, but Mr. Brown explained that the window was stuck. (R. 33:14; App. 14; Exhibit 1 at 0:55-1:02.) Officer Schlei then asked Mr. Brown to keep his hands visible. Mr. Brown complied with the officer's request. (R. 33:14, App. 14; Exhibit 1 at 1:15-1:20.) Officer Schlei testified that he observed a cigarette and cell phone in Mr. Brown's hands "so there was no immediate concern at that time." (R. 33:14; App. 14.)

When Officer Schlei asked Mr. Brown to step out of the vehicle Mr. Brown declined and locked his door. (R. 33:14-15; App. 14-15.) Mr. Brown asked why he had been pulled over, and Officer Schlei stated that gun shots had been reported in the area and Mr. Brown matched the description of a man seen with a gun. (R. 33:27; App. 27.)

Mr. Brown repeatedly told officers on the scene that he wanted to speak to a supervisor. Twenty-five minutes later, after a supervisor arrived, Mr. Brown voluntarily exited the Mazda and officers found a gun in Mr. Brown's front right pocket. (R. 33:15; App. 15.)

The State charged Mr. Brown with one count of carrying a concealed weapon and one count of resisting an officer. (R. 1.) Mr. Brown filed a motion to suppress, asserting that his vehicle had been stopped and he had been seized without reasonable suspicion that a crime had been committed. (R. 5.) After

hearing Officer Schlei's testimony, and listening to the parties' arguments, the circuit court denied the motion. (R. 33:49; App. 49.)

The circuit court concluded that officers had reasonable suspicion to stop Mr. Brown's vehicle because he was a black man wearing a dark-colored hooded sweatshirt, consistent with the description of the 911 caller, and was in the area of where the crime had been committed. (R. 33:43-49; App. 43-49.) The court did not mention that Mr. Brown was wearing pants, rather than shorts. (*Id.*)

Mr. Brown, who had no previous record, (R. 35:20), pled guilty to one misdemeanor count of carrying a concealed weapon, contrary to Wis. Stat. § 941.23(2), and the State dismissed but read in one count of resisting or obstructing an officer, contrary to Wis. Stat. § 946.41(1).² (R. 19; App. 54-55.) Mr. Brown was sentenced to four days in the House of Corrections, time served, and was ordered to provide a DNA sample, to pay the DNA surcharge, and to pay all other costs and surcharges. (R. 19:1; App. 54.)

Mr. Brown appeals, asking this Court to reverse the circuit court's decision to deny his motion to suppress.

STANDARD OF REVIEW

When reviewing a circuit court's decision as to a motion to suppress based upon a Fourth Amendment violation, this Court must uphold the circuit court's findings of fact unless clearly erroneous. *State v. Dubose*, 2005 WI 126, ¶ 16, 285

² Mr. Brown reserved his right to appeal the circuit court's order denying his motion to suppress. (R. 16:3; App. 53.)

Wis. 2d 143, 699 N.W.2d 582 (overruled on other grounds). Whether those facts constitute "reasonable suspicion," is a question of law this Court reviews *de novo*. *Id.*

ARGUMENT

I. THE POLICE LACKED REASONABLE SUSPICION TO STOP MR. BROWN'S VEHICLE, AND ALL EVIDENCE SEIZED SUBJECT TO THAT STOP SHOULD BE SUPPRESSED.

A. Police lacked reasonable suspicion to stop Mr. Brown's vehicle.

The Fourth Amendment of the United States Constitution protects "[t]he right of the people ... against unreasonable searches and seizures." While an investigative stop is technically a "seizure" under the Fourth Amendment, a police officer may, under the appropriate circumstances, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause for arrest. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968); *see State v. Chambers*, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972); Wis. Stat. § 968.24.

To execute a valid investigatory stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that criminal activity has, is, or is about to take place. *See State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729. "A mere hunch that a person has been, is, or will be involved in criminal activity is

insufficient." *Id.* The State bears the burden of proving that a stop was reasonable. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634.

Under the totality of the circumstances here, a reasonable person would not conclude that there were sufficient specific and articulable facts present to justifying stopping Mr. Brown's vehicle. Officer Schlei testified that officers stopped Mr. Brown's vehicle because Mr. Brown allegedly matched the description of a man seen in the area with a gun. However, Mr. Brown's only likeness to the 911 caller's description was that he was a black man wearing a dark-colored hooded sweatshirt, legally driving down a public street. It cannot be that police can stop an individual based on such a vague physical description—that is, that Mr. Brown was black, male, and wearing a dark-colored hooded sweatshirt in October. *See United States v. Street*, 917 F.3d 586, 595 (7th Cir. 2019) ("Ubiquitous or vague physical descriptions or general locations, without more, are not enough to support reasonable suspicion." (citation omitted)). The circuit court erred as a matter of law when it determined otherwise.

B. Even if police had reasonable suspicion to initially stop Mr. Brown's vehicle, the stop should have ended when police observed that Mr. Brown did *not* match the 911 caller's description of the man with a gun.

A reasonable seizure can transform into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. *See State v. Griffith*, 2000 WI 72, ¶ 54, 236 Wis. 2d 48, 613 N.W.2d 72. Here, Officer Schlei testified that police stopped Mr. Brown's vehicle because they believed he

matched the description of a man with a gun. (R. 33:27; App. 27.) However, while the 911 caller described a black man wearing a "black hoody and shorts," (R. 33- 8-9; App. 8-9), upon approaching Mr. Brown's vehicle, Officer Schlei immediately observed that Mr. Brown was a black man wearing a *maroon* hooded sweatshirt and *pants*, (R. 33:13, 26-27; App. 13, 26-27; Exhibit 1 at 0:45-0:52). Furthermore, Mr. Brown was driving a vehicle, and the 911 caller had not indicated that the man with a gun was in or near a car. (R. 33:21; App. 21.) It defies reason that only three minutes after the 911 caller described the man with a gun, the man would have been able to change his shirt and his shorts, walked or run to a vehicle, and would then be found casually driving down the street.

After police officers realized that Mr. Brown did not match the description of the man with a gun reported by the 911 caller, Mr. Brown was only being held because he was a black man near where the man with the gun had been observed. All other indicia indicated he was *not* the man spotted with the gun, yet police continued to detain Mr. Brown anyway in violation of his Fourth Amendment rights.

C. The gun should be suppressed because it was only perceived by officers following an illegal stop.

"Where an unlawful stop occurs, the remedy is to suppress the evidence it produced." *See State v. Washington*, 2005 WI App 123, ¶ 19, 284 Wis. 2d 456, 700 N.W.2d 305; *Wong Sun v. United States*, 371 U.S. 471 (1963). There can be no doubt here that the unlawful stop produced the evidence in this case—the gun

located in Mr. Brown's front right pocket. Because police would not have seized Mr. Brown's gun had they not illegally stopped his vehicle, the gun should be suppressed and Mr. Brown's judgment of conviction should be reversed.

CONCLUSION

Because police lacked reasonable suspicion to stop Mr. Brown's vehicle, and because the gun seized during that stop was only perceived by officers following the illegal stop, Mr. Brown asks this Court to reverse the judgment of conviction.

Dated this 26th day of May, 2020.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street
Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Malinda J. Eskra
State Bar ID No. 1064353
meskra@reinhartlaw.com



By _____
Attorneys for Defendant-Appellant
James E. Brown

FORM AND LENGTH CERTIFICATION

Pursuant to Wis. Stat. § 809.19(8)(d), I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 1,953 words.

Dated this 26th day of May, 2020.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street
Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Malinda J. Eskra
State Bar ID No. 1064353
meskra@reinhartlaw.com



By _____
Attorneys for Defendant-Appellant
James E. Brown

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12), (13)**

I hereby certify that I have submitted an electronic copy of this brief and appendix, which complies with the requirements of Wis. Stat. § 809.19(12), (13).

I further certify that this electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date.

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

Dated this 26th day of May, 2020.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street
Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Malinda J. Eskra
State Bar ID No. 1064353
meskra@reinhartlaw.com



By _____
Attorneys for Defendant-Appellant
James E. Brown

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court;
- (3) a copy of any unpublished opinion cited under Wis.

Stat. § 809.23(3)(a) or (b); and

- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of May, 2020.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street
Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Malinda J. Eskra
State Bar ID No. 1064353
meskra@reinhartlaw.com



By _____
Attorneys for Defendant-Appellant
James E. Brown

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on the 26th day of May, 2020, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Dated this 26th day of May, 2020.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street
Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Malinda J. Eskra
State Bar ID No. 1064353
meskra@reinhartlaw.com



By _____
Attorneys for Defendant-Appellant
James E. Brown

43431729