

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 22, 1997

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.

NOTICE

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

Nos. 96-1880-CR
96-2864-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

ANTHONY M. PATTERSON

Defendant-Appellant.

APPEALS from judgments of the circuit court for St. Croix County:
CONRAD A. RICHARDS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Madden, JJ.

PER CURIAM. Anthony Patterson appeals his convictions for marijuana possession, for nonaffixation of drug tax stamps, and for obstruction of an officer, after a trial by jury. The police found marijuana in a large plastic bag under the console in the

front area of a vehicle in which Patterson was a front seat passenger. The marijuana did not have drug tax stamps affixed as required by § 139.95(2), STATS. On appeal, Patterson makes three basic arguments: (1) the evidence did not prove that he possessed marijuana beyond a reasonable doubt; (2) the jury should have received a cautionary instruction to separate the obstruction of justice charge from the marijuana possession charge; and (3) the drug tax stamp charge was unconstitutional. We reject Patterson's first two arguments and therefore uphold his marijuana possession conviction. However, we agree with Patterson that the drug tax stamp conviction was unconstitutional. We therefore reverse that conviction.

The prosecution provided ample circumstantial evidence of Patterson's guilt on the marijuana possession charge. First, the driver, after recanting his initial statement, asserted that the marijuana was not the driver's. If believed by the jury, this implied that the marijuana was Patterson's. See *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892) (statements operate as circumstantial evidence). Second, Patterson gave a false name when asked by the police for identification. His obstruction of the police constituted an admission by conduct. See *People v. Waller*, 96 P.2d 344, 349 (Cal.1939); *Colin v. State*, 646 A.2d 1095, 1101 (Md. App. 1994); **MCCORMICK ON EVIDENCE** § 271, at 655 (2d ed. 1972); see also *Price v. State*, 37 Wis.2d 117, 132, 154 N.W.2d 222, 229 (1967); *Scott v. State*, 211 Wis. 548, 556, 248 N.W. 473, 476 (1933). Third, Patterson had the trappings of a drug dealer in his possession: (1) a large amount of cash in large denomination bills; (2) marijuana rolling papers without tobacco; and (3) a batteryless pager, creating an inference that Patterson removed the battery to destroy data, another obstructive admission by conduct. Last, Patterson's proximity to the drugs helped imply possession. Taken together, this evidence furnished persuasive circumstantial proof beyond a reasonable doubt of Patterson's marijuana possession.

We also reject Patterson's argument that the trial court had an obligation to give a cautionary jury instruction concerning the marijuana possession charge and the officer obstruction charge. Patterson fears that the jury may have used the obstruction incident, by itself and without regard to other evidence, to infer guilt or perjury by Patterson on the other charges, effectively amplifying the incident beyond its fair inferential value. This argument lacks merit. First, Patterson's use of a false name was a part of a broader incident; a reasonable jury would have considered it as such, not as an isolated event that independently established Patterson's marijuana possession. Second, the false name incident was a time honored kind of circumstantial evidence of guilt on the possession charge; as noted above, the false name incident constituted an admission by conduct. A reasonable jury would have drawn a fair-minded inference from this admmissive conduct, with no prejudice to Patterson. Third, unlike *Peters v. State*, 70 Wis.2d 22, 30-31, 233 N.W.2d 420, 424 (1975), Patterson's use of the false name was contemporaneous with the marijuana possession; the *Peters* obstruction took place twenty-four hours after the burglary at the police station. Patterson's *res gestae* obstruction presented no *Peters*-type risk that the jury would overreach and overconnect two incidents separated by time and place. In sum, the facts did not require a cautionary jury instruction.

However, we agree with Patterson that his drug tax stamp conviction is invalid. The Wisconsin Supreme Court recently held that the drug tax stamp law violated drug dealers' privilege against self-incrimination under the Fifth Amendment of the United States Constitution and art. I, § 8(1) of the Wisconsin Constitution. See *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997). The court concluded that the tax stamp law unconstitutionally permitted the State to use the affixation of tax stamps to establish that an accused knew the drugs were controlled substances. *Id.* The tax stamp requirement constituted a coercive self-incrimination. *Id.* Accordingly, we reverse the

tax stamp conviction and remand the matter to the trial court. On remand, the trial court shall formally vacate the tax stamp conviction and dismiss that charge.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded for further proceedings.

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