COURT OF APPEALS
DECISION
DATED AND RELEASED

March 27, 1997

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. 96-2318-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL ERICKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Reversed and cause remanded with directions.*

DYKMAN, P.J.[1] Michael Erickson appeals from a judgment of conviction for possession of tetrahydrocannabinols (THC) in violation of § 161.41(3r), STATS., 1993-94. He contends that a search of his vehicle violated the Fourth Amendment to the United States Constitution because the police arrested him approximately one hundred yards from his vehicle, as he was leaving a friend's home.

[1] This appeal is decided by one judge pursuant to s. 752.31(2)(c), Stats.

We conclude that the search was not a valid search incident to arrest, and therefore reverse the judgment of the trial court.

BACKGROUND

On October 8, 1995, the Dane County Sheriff's Department received a cellular telephone call from a citizen, Steve Collins. Collins reported that he had been following a possible drunk driver and indicated that the vehicle left its lane of travel and forced an oncoming vehicle off the roadway. Collins then stated that the car had pulled into a driveway at 6800 Schneider Drive.

Sheriff's Deputies Jeff Hook and Brian Morochek were dispatched to the Schneider Drive address. After they arrived they met Deputy Scott Darnell, who had also come to the scene. Collins told the deputies that the driver had entered the house at this address**.**

The deputies entered the house and contacted the driver of the vehicle, who they identified as Michael Erickson. Erickson's eyes were bloodshot, and he was slouched in a kitchen chair. Hook smelled a strong odor of intoxicants and noticed that Erickson's speech was slurred. After some conversation, Erickson agreed to go outside with the deputies.

Once outside, Hook asked Erickson to perform field sobriety tests. Erickson refused, and Hook handcuffed him directly outside the house and arrested him for operating a motor vehicle while under the influence of an intoxicant.[2] Deputies Hook and Morochek walked Erickson down the driveway, which was approximately three hundred feet long, and placed him in their squad car. The squad car was parked directly behind Erickson's vehicle, which was fifteen to twenty feet from the end of the road.

[2] This charge is not at issue in this appeal.

After Erickson was placed in the squad car, Deputy Darnell searched Erickson's automobile and found what was later identified as marijuana in the glove compartment.

Erickson was charged with unlawful possession of THC. He filed a motion to suppress the evidence, challenging the validity of the search of his automobile. The trial court concluded that the police had the right to search Erickson's vehicle after the arrest was made. Therefore, the trial court denied his motion. Erickson pleaded no contest, preserving his right to challenge the order denying suppression under § 971.31(10), STATS. He now appeals the suppression ruling and subsequent conviction.

STANDARD OF REVIEW

In reviewing an order denying a motion to suppress evidence obtained as a result of an unlawful search, we will uphold a trial court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, whether a search and seizure satisfies constitutional demands is a question of law subject to *de novo* review. ***Id.***

DISCUSSION

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. However, the Fourth Amendment permits a law enforcement officer to conduct a warrantless search when that search is incident to a lawful arrest. ***Chimel v. California***, 395 U.S. 752 (1969). In ***Chimel***, the Supreme Court held that an officer making a custodial arrest may search the person in custody and the "area within his immediate control." ***Id.*** at 763. The Court reasoned that such a warrantless search was justified by the need "to remove any weapons [the arrestee] might seek to use in order to resist arrest or effect his escape" and by the need to prevent the destruction or concealment of evidence. ***Id***. In ***Chimel***, the Supreme Court mandated a

case-by-case approach to determine what was within the immediate control of the arrestee. ***Id.*** at 765.

In 1981, the Supreme Court clarified the phrase "the area within the immediate control of the arrestee" as it applies to automobile searches, adopting a bright-line rule. ***New York v. Belton***, 453 U.S. 454 (1981). To establish the workable rule that this category of cases required, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Id.*** at 460 (footnote omitted). The Wisconsin Supreme Court adopted the ***Belton*** standard in ***State v. Fry***, 131 Wis.2d 153, 161-76, 388 N.W.2d 565, 568-75 (1986), holding that the ***Belton*** bright-line test was consistent with both the Wisconsin Constitution and § 968.11, STATS.[3]

Belton applies to "lawful custodial arrests of the occupant" of a vehicle. The term "occupant" indicates that there is some limitation to the ***Belton*** bright-line test. The Wisconsin Supreme Court recognized this limitation in ***State v. Tompkins***, 144 Wis.2d 116, 423 N.W.2d 823 (1988). In ***Tompkins***, state agents followed a drug suspect while he drove to and entered a tavern. After about fifteen minutes, the agents entered

[3] Section 968.11, STATS., provides as follows:

> **Scope of search incident to lawful arrest.** When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:
>
> (1) Protecting the officer from attack;
>
> (2) Preventing the person from escaping;
>
> (3) Discovering and seizing the fruits of the crime; or
>
> (4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

the tavern and arrested Tompkins. During a body search in the bar, the agents found cocaine and a key to Tompkins' vehicle. The agents then took Tompkins outside the bar, where he was handcuffed. Using the key found during the body search, the agents made an immediate warrantless search of the truck and found a small box containing cocaine. ***Id.*** at 120, 423 N.W.2d at 824-25.

The court declined to uphold the search of Tompkins' truck as incident to a lawful arrest. The court reasoned:

> If the defendant had been arrested in the motor vehicle or, as in ***Fry***, had he been stopped while driving and then arrested immediately thereafter just outside of his vehicle, there is no question that the search would have been within the scope of a search incident to a lawful arrest. However, in this case Tompkins was arrested in the tavern some distance from his truck. Tompkins' truck was not "an area within [the defendant's] immediate presence" under sec. 968.11.

Id. at 122-23, 423 N.W.2d at 825-26. Therefore, the court concluded that neither § 968.11, STATS., nor ***Fry*** justified the warrantless search of the truck.

Federal courts have also recognized the "occupant" limitation of the ***Belton*** rule. In ***United States v. Fafowora***, 865 F.2d 360 (D.C. Cir. 1989), two defendants were arrested on drug charges after they had parked and exited their car. The defendants were about one car length from their vehicle when arrested. After the arrest, the drug agents seized evidence from the defendants' vehicle. ***Id.*** at 361. The court held that ***Belton*** was inapplicable under the circumstances and concluded that the search of the vehicle was not a search incident to a lawful arrest. In so holding, the court explained:

> By applying a bright-line rule that the passenger compartment lies within the reach of the arrested occupant, ***Belton*** sought "to avoid case-by-case evaluations" of whether the defendant's area of control within the automobile extended to the precise place where the policeman found the weapon or evidence. No such ambiguity exists, however, where the police come upon the arrestees outside of an automobile. Under such

> circumstances, the rationale for ***Belton***'s bright-line rule is absent; instead, the normal framework of ***Chimel*** applies.

Id. at 362 (citations omitted).

Similarly, in ***United States v. Strahan***, 984 F.2d 155 (6th Cir. 1993), the court held that the ***Belton*** standard only applies when the police initiate contact while the defendant is within his automobile, but subsequently remove him. ***Id.*** at 159. In ***Strahan***, two police officers, acting on an informant's tip, followed Strahan to a lounge where he reportedly sold cocaine. ***Id.*** at 156. After Strahan parked and exited his car, an officer apprehended him approximately thirty feet from his automobile. ***Id.*** at 156-57. He was arrested after the officers discovered cocaine on his person. ***Id.*** at 157. Subsequently, the officers searched his vehicle and found a gun. ***Id.*** The court of appeals reversed the trial court's denial of Strahan's motion to suppress evidence of the gun. The court stated that "***Belton*** clearly limits its application to only those settings where an officer makes a custodial arrest 'of the occupant of an automobile.…' Because Strahan was approximately thirty feet from his vehicle when arrested, ... ***Belton*** [is] inapplicable. The police did not make an arrest of an occupant of a vehicle." ***Id.*** at 159 (emphasis omitted; citation omitted).

We follow ***Tompkins*** and conclude that the search of Erickson's car was not a search incident to a valid arrest. Like Tompkins, Erickson was neither arrested in his vehicle nor stopped while driving and arrested just outside his vehicle. Because Erickson was arrested some distance from his vehicle, the warrantless search of his car was not justified as incident to a lawful arrest.

We are also persuaded by the limit that other courts have placed on the ***Belton*** bright-line rule. To extend the definition of "occupant" of a vehicle to include a person who was arrested approximately 280 feet from his vehicle would blur the bright-line standard that the Supreme Court drew in ***Belton***. *See* ***United States v. Vaughan***, 718

F.2d 332, 334-34 (9th Cir.1983) ("Any extension beyond the exact limits set by ***Belton*** … would open a new set of temporal and spacial uncertainties, as well as increase the likelihood of unjustified invasion of the privacy of individuals.").

The cases upon which the State relies are factually distinguishable. They involve one of two factual situations. In the first set of cases, the police initiated contact while the defendant was in the vehicle. *See* ***State v. Fry***, 131 Wis.2d 153, 161-76, 388 N.W.2d 565, 568-70 (1986) (search upheld when defendant was stopped while driving and arrested immediately thereafter outside of his vehicle). In the second set of cases, the defendant was in close proximity to the vehicle when arrested. In ***United States v. Arango***, 879 F.2d 1501 (7th Cir. 1989), police officers followed a suspicious jeep for nine blocks until it pulled over and parked. After the defendant parked the jeep and made contact with the officers, he shoved one of the officers to the ground and ran from the scene. The defendant was apprehended about one block from his jeep. He was then immediately brought back to the scene of the assault, where the injured officer was in need of medical attention. ***Id.*** at 1503. A subsequent warrantless search of the vehicle was upheld because the defendant was "in proximity" of the vehicle at time of the search, even though he was arrested about one block away from his car. ***Id.*** at 1506. The court did not hold "that officers may search by artificially creating a situation to fit within an exception to the fourth amendment's warrant requirement," but concluded that in this case there was good reason to bring the defendant back to the car, as the officer's partner lay there after being injured by the defendant's assault.[4] ***Id.*** *See also* ***United States v.***

[4] The State does not argue that the officers brought Erickson within a short distance of his automobile when they put him in their squad car, thus bringing him within the ***Belton*** rule. We therefore do not consider whether this would have created "a situation to fit within an exception to the fourth amendment's warrant requirement," disapproved in ***Arango***. We find it difficult to accept, however, that any warrantless automobile search can be validated by bringing an arrested defendant to the vicinity of his or her car.

(continued)

Karlin, 852 F.2d 968 (7th Cir. 1988) (search of vehicle upheld where police officers arrested defendant who was laying on the ground with his foot inside the open driver's door of a van).

Neither of these factual situations is present here. The record indicates that the deputies did not initiate contact with Erickson while he was in his automobile. In fact, it establishes that the deputies contacted Erickson while he was sitting in a kitchen chair in his friend's home. Erickson was then escorted from the house and arrested. He was not arrested close to his automobile, but nearly the length of a football field away from it. Under these circumstances, Erickson was not an "occupant" of his automobile; the ***Belton*** bright-line rule does not apply. We therefore conclude that the trial court erred in denying the defendant's motion to suppress. Accordingly, we reverse the judgment and remand the matter for proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions..

Not recommended for publication in the official reports. *See* Rule 809.23(1)(b)(4), STATS.

We also note that because ***Arango*** is a federal court of appeals case, we are not bound by it. *See* ***Thompson v. Village of Hales Corners***, 115 Wis.2d 289, 307, 340 N.W.2d 704, 712-13 (1983). There is no doubt that where there is conflict between a Wisconsin Supreme Court and federal circuit court case, we are to follow the Wisconsin Supreme Court case. Here, ***Tompkins*** holds that there is a limitation on the ***Belton*** rule.