COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 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

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No. 96-2817-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DWAYNE WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JACK AULIK, Judge. *Reversed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

EICH, C.J. Dwayne Williams appeals from a judgment convicting him of possession of more than 100 grams of cocaine with intent to deliver, as a repeat offender, and sentencing him to twenty years in prison, the presumptive minimum sentence. He pled no contest to the charge, preserving for appeal his challenge to the trial court's denial of his motion to suppress evidence of the

cocaine on grounds that the officers who stopped and eventually arrested him lacked reasonable grounds to suspect that he was carrying controlled substances in his duffel bag. Because the testimony and the facts found by the trial court do not support the court's denial of Williams's suppression motion, we reverse the judgment.

The events leading up to Williams's arrest began when agents of the Wisconsin Department of Justice conducting a drug "interdiction program" boarded a Chicago-to-Minneapolis bus on which Williams was riding as it made a stop-over in Madison. After identifying himself, one of the agents, Bradley Montgomery, asked Williams whether he could look into his duffel bag. Williams said that he could. Opening the bag and noting that it contained some clothing and a box of Tide detergent, Montgomery began to rummage through the bag, eventually removing the detergent box and examining it. On the basis of his experience as a drug-enforcement officer and the results of his examination and inspection, Montgomery suspected that the box contained illegal drugs and seized it. Further investigation revealed that the box contained an amount of cocaine, and Williams was arrested and charged with possession.

Williams moved to suppress the fruits of the search, arguing that Montgomery lacked probable cause to believe he was carrying cocaine. Specifically, he contended that, while he told Montgomery he could "look into" the duffel bag, he did not consent to either a search of the bag or removal and examination of any of its items. After a hearing, the trial court denied the motion and Williams appeals. Other facts will be referred to below.

We employ a two-level standard of review of trial court decisions on motions to suppress evidence. We will uphold the court's factual findings unless

they are clearly erroneous. Section 805.17(2), STATS. Whether those facts satisfy the constitutional requirement of reasonableness, however, presents a question of law which we review *de novo*. ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989).

Initially, there was a dispute over the scope of Williams's consent to the search. Montgomery testified that he "believed" he asked Williams for consent to "look through" his bag. He acknowledged on cross-examination, however, that it was "possible" that he only asked whether he could "look into" the bag. Williams testified that Montgomery asked him only whether he could "look into" the bag, and that he did not consent to either a physical search of the bag or removal of any items from it. This conflicting testimony was pointed out to the trial court in counsel's arguments at the close of the hearing and the court began its decision on the motion by stating: "The court finds that there was permission given by the defendant to look into [his] bag." The testimony of both Montgomery and Williams lends support to this finding, and we conclude it is not clearly erroneous.

Consistent with its finding on the limited scope of Williams's consent to the search, the trial court concluded that Montgomery's observation of the detergent box in the bag, before he removed and inspected it, was enough to sustain its seizure—that, given his training and experience, Montgomery could, solely from that observation, reasonably suspect that it contained illegal drugs.

> [I]n this particular instance, this court … concludes that upon observing the specific item itself, a box of Tide … which is known to these trained officers to be one of the types of transportation can[n]ister, package, [in] which drugs are transported from one place to another, it's this court's conclusion that that … raised reasonable suspicion for the seizure of the box itself.…

> [T]he mere presence of that particular package in [the duffel bag], considering the fact that this is a type of packaging that's used to transport controlled substances, was sufficient for them to seize the package.

Montgomery's testimony does not support that conclusion, however. He stated that, upon looking into Williams's bag, he saw the detergent box, noting that it was "at one end of the bag" and was not hidden under the clothes.[1] Montgomery then searched through the bag, determining that it contained a pair of shoes, a few items of clothing and other travel-related gear. He removed the detergent box, noting that its label listed the weight at 2.93 pounds. He described it as "basically a travel size [box].… about eight inches long, about four to five inches wide, and about six inches tall." Examining the box more closely, Montgomery noticed that its bottom flaps appeared to have been opened and resealed.

> I observed … discoloration of the ink used to color the … outer surface of this box along the folding seals at the bottom…. where the flaps fold over one another.
>
> I observed by looking sideways at the bottom layers or looking at the edge of the flaps … that the laminations had separated, which in opening cereal boxes and other things, you can notice that that happens…. [The layers of paper forming] the flaps had been separated at one point and appeared to have been attempted to be put back in the same condition.

Montgomery said that he then squeezed the box between his hands, observing "a resistance of like a solid object inside the box itself, not a powdery substance [such as detergent]." From that inspection and examination,

[1] In closing argument to the court, Williams's counsel characterized Montgomery's testimony as follows: "[T]he officer testified that he could only see the top of that box. It was standing upright. There was nothing wrong with the top of the box, in plain view. He didn't see the discoloration on the bottom nor any lamination problems."

Montgomery stated, he concluded that the box had been "tampered with" and "suspected that it contained controlled substances.… Possibly a weapon." When asked on what factors he based that suspicion, he replied:

> [It was] based on my training, experience … based on the factors that I observed, the discoloration, the separating of lamination, the resistance within the box as if there was a solid object within the box, all led me to believe that this was not the normal packaging or the normal way that this box should appear.

He stated that he knew from his training and experience that "false containers [are] commonly used in the transportation of narcotics."

According to Montgomery, at that point he asked Williams whether he would consent to his opening the box and Williams said he would not. Montgomery then told Williams he was going to "detain" the box for "further investigation." Two police dogs were brought to the bus station and, after one of them "reacted positively" to the box, Montgomery told Williams he would be taken into custody while the officers applied for a search warrant. The warrant was issued later in the day and, as indicated, the detergent box was opened and found to contain cocaine.

We agree with the State that if Montgomery's search of the duffel bag and his removal and inspection of the detergent box were permissible, grounds would exist to seize the box for further investigation. In ***United States v. Place***, 462 U.S. 696, 703, 704 (1983), the Supreme Court stated that "where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial" because of the transient nature of drug-courier activity. *See also* ***State v. Gordon***, 159 Wis.2d

335, 344, 464 N.W.2d 91, 93, 94 (Ct. App. 1990) ("reasonable suspicion" that a package contains contraband justifies its seizure for further investigation).

The State does not argue that Montgomery had any grounds to even open or look into Williams's bag absent his consent. Indeed, when the agents confronted Williams they knew only that he was a passenger on a bus and was carrying a duffel bag. The only basis proffered for the search was Williams's consent. Given the trial court's factual finding that Williams's consent to the search was limited—he consented only to Montgomery's "looking into" the bag—the reasonableness of Montgomery's suspicion that the box contained either a weapon or illegal drugs must be judged by his observation of the box in the bag, not by the subsequent events. And Montgomery's plain and unequivocal testimony compels the conclusion that he did not have such a suspicion at the time he looked into the bag and saw the box. He testified that he suspected that the box contained controlled substances only after he removed the box from Williams's duffel bag and inspected and examined it—all of which well exceeded the limited scope of Williams's consent which, as we indicated, provided the only authority for Montgomery to search the bag.

The State points out that Montgomery undertook his search of the bag in Williams's presence, and that Williams did not voice any objection until he removed the detergent box, examined it and asked whether he could open it. But the State offers no authority that would imply consent to search—or to expand the scope of a limited consent—from a mere failure to protest. It cites us only to ***Florida v. Jimeno***, 500 U.S. 248, 250-51 (1991), for the proposition that the scope of an accused's consent to a search is measured by a "reasonableness" standard: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?"

As we noted, Williams testified that he gave Montgomery consent only to look into the bag, not to search through it or remove items from it. Montgomery could not testify to the contrary, stating only that, while he "believed" he asked for consent to "look through" the bag, it was equally possible that he asked only to "look into" it, and, as we also indicated, the trial court expressly found the latter to be the fact.[2]

In the absence of citation to authority compelling such a result, we decline the State's invitation to hold, in effect, that a police officer may expand a limited consent to search into a limitless consent unless the suspect specifically objects to each successive transgression of the limitation. We conclude, therefore, that, given the evidence of record and the trial court's findings, it was error to deny Williams's motion to suppress the evidence.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

[2] The State concedes in its brief that there was a "factual dispute" over the scope of Williams's consent to the search, and, as indicated, the trial court resolved that dispute by finding the consent to be limited to looking into, rather than searching through, the duffel bag. That finding, having support in the evidence, is conclusive on appeal. ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979).