COURT OF APPEALS
DECISION
DATED AND RELEASED

May 1, 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. 96-3249-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BONNY TREUTELAAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

ROGGENSACK, J. Bonny Treutelaar appeals her conviction for possession of drug paraphernalia, following the denial of her motion to suppress evidence seized during a warrantless search of an automobile in which she was a passenger. She presents the issue: whether a search incident to the arrest of one occupant of a stopped vehicle extends to the private property of any non-arrested occupants. Because we conclude that the permissible scope of such a search

extends at least to all containers or packages within the vehicle which are large enough to hold weapons or contraband, regardless of their ownership, we affirm.[1]

BACKGROUND

On March 30, 1995, Deputy Sheriff Michael Weber made a routine traffic stop of a vehicle driven by Ronald Bowe, in order to ascertain whether a slip of paper taped to the back of Bowe's window indicated that the owner had applied for license plates. Treutelaar was a passenger in the right front seat of Bowe's car. When Weber ran a check on Bowe's driver's license, he discovered an outstanding warrant for Bowe's arrest on an unspecified charge. At that point, Weber asked Bowe to step out of his car, and the officer arrested Bowe, handcuffed him, and placed him in the back of the squad car.

Weber then approached Treutelaar, who was still seated in Bowe's car, and asked her for identification. She indicated that she had none. Weber waited about twenty minutes for his backup to arrive, then approached Treutelaar again to offer her a ride in the other officer's squad car. Treutelaar put on her shoes and jacket, and got out of the car. She asked to be given an 8 x 10 manila envelope which had been lying near her shoes on the passenger floorboard, explaining that the envelope contained some papers and money she wished to take with her.

Sergeant Miller told her that she could not have the envelope until the officers had searched it for weapons and contraband, incident to Bowe's arrest. Weber and Miller then searched the car and the envelope for "weapons, drugs, or

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

any evidence or indication of criminal activity." Prior to the search of the envelope, Weber had no particularized suspicion that Treutelaar had engaged in any criminal activity. Nor did the officer have any particular reason to believe that Bowe possessed a weapon or had been engaged in any criminal activity. However, he stated that the envelope was large enough to have contained a weapon.

When Weber opened the envelope, he found lipstick, mascara, and three wire mesh screens, one of which had some white residue on it. Weber thought that the screen could be used for smoking crack cocaine, and questioned Treutelaar about it. Based on her responses, he placed her under arrest and charged her with possession of drug paraphernalia.

Treutelaar was subsequently charged in a criminal complaint with a violation of § 161.573(1), STATS.[2] She moved to suppress the admission of the mesh screens and her statements regarding them, as the "poisonous fruit" of an unconstitutional search of her property without a warrant, and without probable cause. The trial court denied her motion, reasoning that the envelope was a container in a vehicle under the control of an arrested person, and therefore was properly searched incident to Bowe's arrest. Treutelaar challenges the denial of her suppression motion on appeal.

DISCUSSION

Standard of Review.

When reviewing the denial of a motion to suppress evidence obtained as a result of an unlawful search, the trial court's findings of fact will be

[2] Renumbered as § 961.573(1), STATS., by 1995 Act 448, effective July 9, 1996.

upheld unless clearly erroneous. Section 805.17(2), STATS.; ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, this court will independently determine whether a search and seizure satisfies constitutional demands, including whether a search may properly be considered incident to an arrest. *See* ***State v. Fry***, 131 Wis.2d 153, 171, 388 N.W.2d 565, 573 (1986).

Scope of an Automobile Search Incident to Lawful Arrest.

A warrantless search is unreasonable *per se* unless it falls within an established exception to the Fourth Amendment's general prohibition against unreasonable searches and seizures. ***Thompson v. Louisiana***, 469 U.S. 17, 20 (1987). Wisconsin has codified the exception relevant to this case in § 968.11, STATS., which provides:

> **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.

While § 968.11 defines acceptable reasons for permitting a search without a warrant if it is incident to arrest, the section does not require proof of the officer's subjective reasons for conducting a search. ***Fry***, 131 Wis.2d at 168, 388 N.W.2d at 572. The statutory justification for a search of the area within an arrestee's immediate presence exists regardless of the officer's intent. ***State v. Mabra***, 61 Wis.2d 613, 625, 213 N.W.2d 545, 551 (1974). However, the "immediate

presence" requirement does limit searches "to the area from which a defendant might gain possession of a weapon or destructible evidence." ***Fry*** at 166, 388 N.W.2d at 571.

Federal case law interpreting the Fourth Amendment does not use the term "immediate presence," which is used in the Wisconsin statute. However, in order to prevent confusion caused by differing standards, Wisconsin has conformed its interpretation of its own statutory and constitutional search and seizure provisions to the United States Supreme Court's Fourth Amendment jurisprudence. ***Fry***, 131 Wis.2d at 172, 388 N.W.2d at 573. Thus under both state and federal case law, when a law enforcement officer makes "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 168, 388 N.W.2d at 571, *citing* ***Chimel v. California***, 395 U.S. 752, 763 (1969); ***New York v. Belton***, 453 U.S. 454, 460 (1981). In the course of such a search, the officer may also examine the contents of any containers or packages found in the automobile's passenger compartment, whether they are open or closed, locked or unlocked, and regardless of the level of expectation of privacy associated with any particular container. ***Fry***, 131 Wis.2d at 177-178, 388 N.W.2d at 575-76. The search of a vehicle may be considered "contemporaneous"[3] with the arrest of a recent occupant of the vehicle "as long as the search begins immediately after the arrest and the defendant remains at the scene." ***Id***. at 180, 388 N.W.2d at 577.

[3] The scope of a permissible warrantless search which is conducted incident to an arrest varies from that which is based on probable cause to believe that evidence of a crime is present. ***State v. Fry***, 131 Wis.2d 153, 181, 388 N.W.2d 565, 577 (1986).

The facts of this case fit squarely within the rule articulated in ***Belton*** and adopted by ***Fry***. The police made a lawful, custodial arrest of Bowe. Immediately prior to his arrest, Bowe was driving a vehicle which he owned and over which he had control. The envelope in question was located in the passenger compartment of that vehicle, and was large enough to contain a weapon, providing a § 968.11(1), STATS., reason for the search. The defendant remained on the scene at the time of the search. Thus, had the envelope belonged to Bowe, there would be absolutely no question that it was lawfully searched incident to his arrest.

Treutelaar nonetheless contends that it was unreasonable to search her private property absent probable cause that she had committed a crime or that evidence might be destroyed. She notes that in both ***Belton*** and ***Fry*** the confiscated property belonged to the person arrested, and argues that therefore neither case is binding here. Similarly, she attempts to distinguish ***State v. Hamdia***, 135 Wis.2d 406, 410, 400 N.W.2d 484, 485 (Ct. App. 1996), in which this court upheld the warrantless search of a vehicle controlled by a passenger of the car, based on the lawful arrest of the driver. Hamdia had left the scene before the search, so the officer could not ascertain who owned the property before it was searched, whereas here Treutelaar told the officer the envelope was hers prior to the search. However, in ***Hamdia***, we specifically stated that compliance with the ***Fry*** requirements adequately protects the rights of any vehicular occupants who are not arrested. Finally, she points to other jurisdictions such as Pennsylvania and North Dakota which have specifically held that the search incident to arrest exception does not justify warrantless searches of the personal property of automobile passengers. *See* ***Commonwealth v. Shiflet***, 670 A.2d 128 (Pa. 1995) (suppressing the search of a passenger's purse) *and* ***State v. Gilberts***, 497 N.W.2d 93 (N.D. 1993) (suppressing the search of a passenger's jacket pocket).

For the purpose of our analysis, we acknowledge that the facts of ***Belton***, ***Fry***, and ***Hamdia*** are different, though the differences do not affect the policies which drive the decisions. We also note that authority from other jurisdictions is split on this issue. *Cf.* ***Shiflet*** *and* ***Gilberts***, supra*, with* ***People v. McMillon***, 892 P.2d 879 (Colo. 1995) (holding warrantless search of passenger's purse was proper as search of vehicle incident to lawful arrest of driver). Nonetheless, we conclude that the bright-line rule established by ***Belton*** and ***Fry*** may encompass the personal property of non-arrested passengers. The validity of the search still depends upon whether the arrest was lawful and the search was a contemporaneous incident of that arrest. As one appellate court has stated:

> In circumstances where the police stop a vehicle with multiple passengers and arrest one of them, the need for the police to discover either hidden weapons which could be turned upon them or evidence which could be destroyed is no less acute simply because a person other than the arrestee owns the "container" in which those items might be located. … Third-party ownership of the auto or "containers" therein would not necessarily prevent the arrestee from gaining access to those items. It should not, therefore, bar the police from searching them in the same manner as if they were owned by the arrestee.

Staten v. United States, 562 A.2d 90 (D.C. 1989). Furthermore, if we adopted the defendant's theory, a driver could simply hand over all weapons and contraband to his passenger, or the passenger could claim ownership of any containers in the vehicle, and avoid detection. We think it is unreasonable to require an arresting officer to determine the ownership of all containers located within a stopped vehicle before searching them. Therefore, we hold that the police may validly search the belongings of a passenger after the driver of a vehicle has been arrested,

at least so long as the belongings are large enough to conceal a weapon or contraband, and are located in the vehicle when the search is made.[4]

The envelope at issue here was large enough to conceal a weapon or evidence of a crime, and it was easily within the arrested driver's reach prior to the time he stepped out of the vehicle. Treutelaar left the envelope on the front passenger floorboard when she exited the vehicle. Therefore, the envelope was "within the area from which a defendant might gain possession of a weapon or destructible evidence" at the time of the search. ***Fry***, 131 Wis.2d at 166, 388 N.W.2d at 571. The ownership of the envelope was irrelevant to the safety of the officers, or the reasonableness of their search. Therefore, the envelope was properly searched incident to Bowe's arrest, notwithstanding any privacy interests which Treutelaar might claim in its contents, and Treutelaar's suppression motion was properly denied.

CONCLUSION

Treutelaar's envelope was on the floor of the passenger compartment of Bowe's car when Bowe was lawfully arrested, and was thus within the driver's immediate presence. Under ***Fry***, the police were entitled to search the envelope for weapons or evidence notwithstanding Treutelaar's claim that the envelope belonged to her.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4., STATS.

[4] We do not today decide whether the police may lawfully search any personal property of an occupant of the automobile which the occupant takes out of the vehicle before the search is conducted.