COURT OF APPEALS DECISION DATED AND FILED

December 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-3399-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC A. PAARMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Eric A. Paarmann appeals from a judgment of conviction of party to the crime of possession of marijuana and cocaine with intent to deliver and from an order denying his motion for postconviction relief. He challenges the vehicle search and the performance of trial counsel. We reject his claims and affirm the judgment and the order.

On January 16, 1996, the vehicle Paarmann was driving, a 1984 Cadillac, was stopped at approximately 9:00 p.m. on an interstate highway. The officer had observed the vehicle deviate from the center lane on two occasions and was concerned that the driver was either intoxicated or falling asleep.

Paarmann does not challenge the reason for the stop or the officer's initial contact with Paarmann and his passenger. Rather, Paarmann contends that after the officer verified the vehicle registration and his driver's license, no cause existed for an expansion of the stop by the officer's request to search the vehicle.

The detention of a person during a brief traffic stop must not be "unreasonable" under the circumstances. *See* ***State v. Gaulrapp***, 207 Wis.2d 600, 605, 558 N.W.2d 696, 698 (Ct. App. 1996). An investigative detention is to last no longer than necessary to effectuate the purpose of the stop. *See* ***Florida v. Royer***, 460 U.S. 491, 500 (1983). However, "[w]hen an officer develops a reasonable, articulable suspicion of criminal activity during a traffic stop, 'he [or she] has "justification for a greater intrusion unrelated to the traffic offense."'" ***United States v. Pereira-Munoz***, 59 F.3d 788, 791 (8th Cir. 1995) (quoted source omitted). The reasonable suspicion necessary to detain a suspect for investigative questioning must rest on specific and articulable facts, along with rational inferences drawn from those facts, sufficient to lead a reasonable person to believe that criminal activity may be afoot, and that action would be appropriate. *See* ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968).

The officer observed the lane deviations. As Paarmann pulled his vehicle over, a passenger popped up in the backseat and repeatedly looked back and forth between the two squad cars present at the scene. When producing his driver's license, Paarmann was observed to be unusually nervous.

Michael Messina, the passenger, correctly identified to whom the car was registered. He reported that they were returning from "LaPlant" but could not explain to the officer where "LaPlant" was. The officer observed one or two pagers inside the car and that the car had a "junky" appearance with scattered papers and soda cups. The collection of these items can be indicative of drug dealing. *See* ***State v. Stankus***, 220 Wis.2d 232, 236, 582 N.W.2d 468, 470 (Ct. App. 1998); ***State v. Dye***, 215 Wis.2d 280, 290, 572 N.W.2d 524, 528-29 (Ct. App. 1997), *cert. denied*, 118 S. Ct. 1825 (1998). A criminal history check revealed that one or both of the occupants of the vehicle had a prior conviction for possession of a controlled substance.

With these facts, the officer asked Paarmann if he had anything illegal in the car. After Paarmann responded "no," the officer asked if she could search the car. This was permissible action because a seizure had not taken place. *See* ***Gaulrapp***, 207 Wis.2d at 609, 558 N.W.2d at 700. Moreover, the officer's observations raised an articulable suspicion that Paarmann or Messina might be in possession of illegal substances. The expansion of the stop was reasonable. *See* ***Valance v. Wisel***, 110 F.3d 1269, 1277 (7th Cir. 1997) (traffic stop does not develop into an unreasonable seizure so long as something occurred in the course of the stop to give the officers the reasonable suspicion of criminal activity in addition to that which occasioned the stop).

Paarmann claims that there was no valid consent to search the vehicle. He contends that once he refused to consent to a search, the subject was closed for further inquiry. With respect to consent issues, the trial court's findings of fact will not be disturbed unless clearly erroneous. *See* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998). Application of the facts to constitutional principles is a question of law subject to de novo review. *See* ***id.***

When asked if the car could be searched, Paarmann referred the officer to Messina because the car belonged to Messina's sister. Paarmann testified that he told the officer to ask Messina. The officer was justified in turning to Messina for consent to search.

Paarmann places great significance on the fact that he was placed in the squad car before Messina was asked to consent to the search. He characterizes this as an illegal detention or arrest and that it tainted any consent obtained from Messina. This claim fails because the officer had reasonable grounds to expand the scope of the stop and to ask Messina for permission to search, as Paarmann directed.

Even if an illegal arrest occurred, the search conducted after Messina's consent was sufficiently attenuated so as to not require suppression of the drugs. There was no link between Paarmann's placement in the squad car and seeking consent from Messina. There is no suggestion that Messina was given the impression that he could not refuse to give consent. Consent from Messina is a substantial "intervening circumstance" supporting attenuation. *See* ***Phillips***, 218 Wis.2d at 208-09, 577 N.W.2d at 807. We affirm the trial court's refusal to suppress the fruits of the search.

Paarmann claims that trial counsel was ineffective because in opening argument counsel made reference to Paarmann's previous conviction for possession of marijuana. In setting up the theory of defense that Paarmann had no knowledge that a large amount of drugs was in the car, counsel explained why Paarmann was so nervous during the traffic stop: "[T]he reason he was nervous is because about three or four years ago he had a conviction for possessing a very small amount of marijuana, like a thumbnail amount. And in his coat pocket—he

smokes marijuana pretty much on a daily basis—he had a pipe with some—not a pipe, he just had a small amount of marijuana inside of a plastic bag. I think it was 6.5 grams, very tiny amount." Trial counsel testified that he mentioned the prior conviction because he believed that the reading of the information to the jury revealed that this was a second offense and the defense did not want to appear to be hiding anything. Counsel indicated that Paarmann agreed with this strategy.

"There are two components to a claim of ineffective trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted).

The State practically concedes that trial counsel's reasoning was faulty because a repeater charge is not revealed to the jury. *See* ***Mulkovich v. State***, 73 Wis.2d 464, 468, 243 N.W.2d 198, 201 (1976). While counsel's performance may have been defective, we conclude that Paarmann was not prejudiced.

Under the prejudice prong of the ineffectiveness test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. *See* ***State v. Pitsch***, 124 Wis.2d 628, 640-41, 369 N.W.2d 711, 718 (1985). An error is prejudicial if it undermines confidence in the outcome. *See* ***id.*** at 642, 369 N.W.2d at 719.

The jury learned from sources independent of trial counsel's reference that Paarmann possessed and regularly smoked marijuana. The investigating officer testified that Paarmann had a small amount of marijuana in

his pocket. Messina indicated that Paarmann used marijuana. Messina also said that he had offered Paarmann $100 in either cash or marijuana to drive him.

There was evidence that Paarmann was not an unknowing participant in the drug run made the night he was stopped. Paarmann was asked to drive Messina to Chicago and back. Messina explained that Paarmann had waited in the car while Messina went into a restaurant for thirty to forty-five minutes. Messina placed the drugs in the trunk upon returning to the car.

The reference to the prior conviction was in a manner which minimized Paarmann's status as a drug dealer. It suggested that only a small amount supported the prior conviction. The reference, in a case where two types of drugs were found and the evidence established Messina's purpose for the trip, does not undermine our confidence in the outcome. Paarmann's claim of ineffective counsel fails.

By the Court.—Judgment and order affirmed.

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