COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP207-CR **Cir. Ct. No. 2003CM6777**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

¶1 CURLEY, J.[1] Charles E. Jones appeals from a judgment convicting him of one count of carrying a concealed weapon, in violation of WIS. STAT. § 941.23 (2003-04). He contends that the trial court erred in denying his motions

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

to suppress statements he made to the police and the evidence—a handgun, bullets, and a t-shirt—seized from his vehicle. Because the traffic stop was valid and Jones consented to the search, this court affirms.

I. BACKGROUND.

¶2 On August 20, 2003, Milwaukee County Sheriff's Detectives Keith Thrower and James Thomas were on routine patrol when they observed a vehicle, driven by Jones, with a left-rear taillight burnt out. They conducted a traffic stop, during which time they performed a routine check on the driver. During the course of the stop, Thrower asked Jones to step out of the vehicle to speak with him. The detective asked Jones whether he could search the vehicle, and after a brief conversation, Jones told the detective that he had a handgun on the front seat of the vehicle, and consented to the search. The detective retrieved a handgun wrapped in a t-shirt, which was loaded with eight unfired cartridges. Several days later, Jones was charged with one count of carrying a concealed weapon.

¶3 On October 6, 2003, Jones filed motions to suppress both the evidence seized from his vehicle and the statements he made to the police. At the first motion hearing, the State called Thrower to testify. Thrower testified that he is a detective with the Milwaukee County Sheriff's Department GRIP Unit,[2] a program that aims to get illegal firearms off the streets, and that one of the techniques employed by the unit is to request permission to search the vehicle during a routine traffic stop. He testified that on August 20, 2003, he stopped Jones' vehicle because it had a burnt out taillight—a violation of the Wisconsin

[2] Thrower testified that GRIP stands for the Gun Interdiction Reduction Program, and the main objective of the program "is to get the illegal firearms off the street."

traffic code. Because he and the other detective were in plain clothes and in an unmarked squad car, they identified themselves to Jones and explained why they had stopped him. Thereafter, Thrower and his partner returned to the squad car to run a check on Jones' license. When they discerned that the license was valid, they decided to get Jones out of the car, explain what they were "about," and ask if he would consent to a search of his vehicle. Accordingly, approximately five to seven minutes later, Thrower asked if Jones could step out of the car and if Thrower could speak to him at the rear of his vehicle. Jones agreed, and Thrower explained "who [they] were and what [they] were out [t]here for"—that they were looking for guns or "dangerous or illegal items of that nature." Thrower testified:

> Basically the first thing he said is, man, all I'm trying to do is go get something to eat and in return I said, well, talk to me, what are you worried about I said, a little minor dope or whatnot and basically Mr. Jones kind of took a sigh like a breath and he said I'm going to go to jail and when you say like that statement to a police officer you know something is up, some suspicion is – get your hairs up.

At that point, Thrower asked Jones to explain what was going on, and Jones told Thrower that he had a weapon on the front seat of his vehicle. Thrower placed Jones in handcuffs and retrieved the weapon from the vehicle.

¶4 On cross-examination, Thrower testified that Jones never asked what would happen if he did not consent to the search, and that he never told Jones he could just leave. He also testified that he would have let Jones leave if he had not consented to the search or said that he wanted to leave.

¶5 At the continuation of the motion hearing, the defense called Carlton Manske, a private detective, to testify. Manske testified that he observed Jones' vehicle a little less than two months after the traffic stop. He recalled that there were two bulbs in each of the two vertical taillights on the vehicle, and that when

the headlights were turned on, all four bulbs were lit. When the brakes were applied, however, while both bulbs on the right side and the bottom left bulb illuminated, the top left bulb went out. He also testified that the horizontal light in the rear window illuminated when the brakes were applied. On cross-examination, Manske testified that he did not know where the vehicle had been and whether it had been serviced in the approximately two months between the stop and when he observed the vehicle.

¶6 Next, Jones testified on his own behalf. He testified as to the condition of his vehicle's taillights when he was stopped:

> Q When did you see them?
>
> A The officer showed me when he stopped me.
>
> Q Okay. And what did he show you?
>
> A When he hit the brake, he said that the light went out. But it didn't go out, it just went dim a little bit.
>
> Q Okay. That was on the scene then, is that what you're saying?
>
> A Right.
>
> Q On the scene, did you always have at least one bulb, taillight bulb on either side of your trunk lid working?
>
> A Yes.

Jones also testified that his parents came to the scene to retrieve the car, that his father did not believe that the taillight was out, and that he and his friend fixed the taillight several months later after they read a book on wiring. He also maintained that the light never went out, but it would "go dim."

¶7 The State called Deputy Daniel Carter as a rebuttal witness. Carter testified that he went to the scene of the stop as back up. While he was there, a

man, later identified as Jones' father, approached the scene in an argumentative manner. When asked to describe Jones' father's demeanor, Carter testified: "Stark voice, higher volume, demanding answers to his questions." He testified that Thrower explained that he stopped Jones because the brake light was not working, and asked Jones' father to stand behind the car and watch what happened as he depressed the brake. Carter testified that he stood with Jones' father while Thrower depressed the brake, and observed that the left taillight did not illuminate—"[n]ot at all." He also testified that once Thrower showed the father that the taillight did not work, "he calmed down and said okay."

¶8 Jones argued that, in light of the specific requirements of WIS. STAT. §§ 347.13 and 347.14,[3] there was no equipment violation, because although there was some question as to how many of the five lights were working (including the horizontal light), there was "no question that at least two of each kind were working at all times. … It's not a traffic violation to have one of five, or if Deputy Carter is correct, two of five stop lamps not working, because you always had at least two." Jones insisted that because at least two were working, there was no violation of the traffic code, and thus there was no legitimate reason to stop him—

[3] Jones iterated the requirements as follows:

> Tail lamps, the equipment requirement is that all vehicles must be equipped with at least one. Farther down it says, if the—if the vehicle is equipped with two tail lamps, then essentially two have to work. As to stop lamps, we have essentially the same thing. Each vehicle has to have—be equipped with at least one stop lamp. And it it's equipped with two, then two of them have to work.

WISCONSIN STAT. § 347.13 provides, in part, as follows: "No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order." § 347.13. WISCONSIN STAT. § 347.14 contains an identical sentence using the words "stop lamp" instead of "tail lamps."

"[t]he stop was bad, and the evidence … derived therefrom, is not admissible." Jones also argued that the testimony was inconsistent as to whether the taillight or the brake light was out—Thrower testified that the taillight was out, while Carter testified that the brake light was out. Moreover, both Jones and Manske testified that only the top left bulb went out when the brake was depressed. As such, Jones insisted that he just could not "see how the [S]tate can claim it's met its burden, because they do have the burden."

¶9 The trial court was unpersuaded:

> No, I think we're arguing about how many angels can dance on the head of a pin. Deputy Carter described that the brake light wasn't working. And when Mr. Jones' father came, they showed him that the brake light wasn't working. He didn't testify at all about the taillight. So I don't know if the taillight was working or not. But the brake light wasn't working. And that leads one to believe that if the brake light wasn't working, the taillight probably wasn't working either. They work in conjunction with each other. I don't know if the taillights were on when Officer Carter was there when Mr. Jones arrived on the scene. But whether this was an equipment violation or not is not the issue before the court. It seems to me he didn't get a ticket for not – We're not deciding whether he should have got a ticket for having a burnt out taillight. *There is no question that there was something wrong with the taillight. Whether the entire taillight was out or part of it was out, the officer stopped him because of the taillight violation or observation that it was out. My impression of his testimony was that the entire left taillight was not functioning, and that's why he stopped him. But there is no question that there was something wrong with the taillight, because Mr. Jones indicated that he later fixed it himself.*
>
> So I think that the initial stop that the officer made was appropriate. And as you point out then … the supreme court has said if there is a legitimate violation or reason to stop the vehicle, even if it later appears to be a pretext stop, nevertheless it's valid. It's a valid stop.

(Emphasis added.) Thus, after concluding that there was no challenge to the testimony that Jones consented to the search that produced the handgun, the trial court denied the motions to suppress. Jones subsequently pled guilty to the charge and was sentenced to eight months in the House of Correction. Jones now appeals.

II. ANALYSIS.

¶10 On appeal, Jones argues that the trial court erred in denying his motions to suppress because the detectives lacked probable cause to stop his vehicle. Jones insists that he did not violate WIS. STAT. § 347.13 under the plain language of the statute, because: (1) as Manske testified, "only one of the bulbs went out on the left vertical taillight and the other bulb 'shone brighter' when the brakes were activated"; and (2) "the testimony revealed that it was not until the brakes were activated that the left vertical light would dim or go out, and at that time, the third brake light, located on the back window deck of the vehicle, would activate, leaving at least two separate taillights illuminated." Accordingly, citing ***State v. Longcore***, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), for the proposition that "[i]f the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no

probable cause that a violation has occurred[,]" ***id.*** at 9, Jones insists that the detectives lacked probable cause to stop him.[4]

¶11 In reviewing a motion to suppress, we will uphold a trial court's findings of evidentiary or historical fact unless they are clearly erroneous. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. Whether Jones' constitutional guarantee against unreasonable searches and seizures was violated, however, is a question of constitutional fact, which we review *de novo*. *See* ***State v. Malone***, 2004 WI 108, ¶14, 274 Wis. 2d 540, 683 N.W.2d 1.

¶12 "The '[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the [Fourth Amendment]." ***Id.***, ¶24 (citation omitted). That is, a traffic stop is a form of seizure, and we evaluate the detective's conduct under principles similar to those used to address ***Terry*** stops.[5] *See* ***id.***

[4] Jones also argues that he did not voluntarily consent to the search and that his statements made in that regard should be suppressed. Although Jones attempts to cast portions of Thrower's testimony in a light that attempts to indicate that Jones did not voluntarily consent to the search, Jones did not argue this point during the motion hearing. While he may have summarily stated, in one sentence in each of the original one-page suppression motions, that he did not voluntarily consent to the search, he failed to argue as much during the hearing. Jones focused on the validity of the stop, and did not argue whether his consent to the search was voluntary, thereby abandoning the argument. The trial court also noted that Jones did not present any "challenge to the deputies' [sic] testimony that Mr. Jones had consented for him to look in the car[.]" As such, this court will not address Jones' general appellate argument that he did not consent to the search and that his statements related thereto should be suppressed. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) ("It is the often repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal.") (emphasis added).

[5] ***Terry v. Ohio***, 392 U.S. 1 (1968).

¶13 An officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. ***State v. Colstad***, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100; *see also* ***State v. Griffin***, 183 Wis. 2d 327, 330-34, 515 N.W.2d 535 (Ct. App. 1994). The question of what constitutes reasonable suspicion is a common-sense test. ***Colstad***, 260 Wis. 2d 406, ¶8. The test is an objective one, and the suspicion must be grounded in specific, articulable facts along with reasonable inferences from those facts. ***Id.*** Stated otherwise, to justify an investigatory stop, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623.

¶14 While Jones makes much of Manske's and his own testimony indicating that there was one bulb still functioning in the left taillight, he glosses over the essential fact that everyone agrees that the left taillight, in some form, was not working properly. The trial court found that there was no question that there was something wrong with the taillight.[6] In light of the testimony, that finding is not clearly erroneous.

¶15 Moreover, the statutes do not address whether the number of "bulbs" within a taillight has any significance, or whether a third "brake light" in the rear window of a vehicle changes anything. But these questions need not be resolved here. What the statutes do indicate is that if a vehicle has two tail or brake lamps

[6] In making that finding, the trial court appeared to view the "taillight" as the entire apparatus and not by individual bulb or light. Moreover, it appears that any distinction in the testimony between taillights and brake lights may have been a matter of semantics.

(which are presumably located on the left and right sides of the vehicle) they must all be in "good working order." Here, Thrower observed, and the trial court found, that they were not. Unlike ***Longcore***, this is not a case of "legal misinterpretation."

¶16 Thus, the only question in this case is whether the stop was valid, and the validity of the stop depends on whether the detectives had reasonable suspicion to stop Jones. Thrower testified that he stopped Jones because he observed a burnt-out taillight. There was ample testimony regarding that fact, and as the trial court indicated, it was reasonable to conclude that the left taillight was not functioning properly at the time of the stop. Thus, in light of the totality of the circumstances, there was undoubtedly something wrong with the taillight, and accordingly, the detectives possessed the requisite reasonable suspicion for a valid investigatory stop. Accordingly, this court affirms.

By the Court.—Judgment affirmed.

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