COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP126-CR **Cir. Ct. No. 2004CM65**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT F. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: RICHARD D. DELFORGE, Judge. *Affirmed in part; reversed in part.*

¶1 HOOVER, P.J.[1] Robert Jones appeals his convictions for possession of drug paraphernalia and obstructing an officer. He argues the arresting officer did not have reasonable suspicion that he was armed and therefore the officer's patdown search was illegal. We agree that the officer did not have

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

reasonable suspicion that Jones was armed and reverse the conviction for possession of drug paraphernalia. However, we affirm the obstruction conviction.

BACKGROUND

¶2 On March 31, 2004, at approximately 9 p.m., Jones was a passenger in a vehicle driven by Delbert Welch. Trooper Kevin Schneider clocked the vehicle traveling at seventy-five miles-per-hour in a fifty-five mile-per-hour zone. Schneider stopped the vehicle and asked Welch and Jones for their driver's licenses. Jones stated he did not have any identification with him so Schneider asked Jones to write down his name and date of birth. Jones wrote that his name was Dean M. Sexton.

¶3 Schneider noted that Jones and Welch seemed nervous. When he returned to his squad, he called Inspector Jamie Mischka for assistance. When Mischka arrived, Schneider decided to conduct a Badger stop.[2] Schneider wrote Welch a speeding ticket. He then approached Welch's vehicle on the driver's side, while Mischka approached on the passenger side. Schneider gave Welch the ticket and told him he was free to go. Schneider took a few steps away from the vehicle, then turned and went back and asked Welch if there was anything illegal in the car. Welch said there was not. Schneider asked if he could look inside and Welch responded, "go ahead."

¶4 Schneider asked Welch and Jones to exit the vehicle. Welch agreed to be patted down by Schneider. Jones exited the vehicle with his hands in his

[2] Schneider testified that a Badger stop is a technique whereby law enforcement officers end and then reinitiate contact in an attempt to obtain consent to search. Schneider stated, "The subject has to be free to go before you can ask for consent."

pockets. Mischka asked him to take them out. Jones complied and Mischka searched Jones's pockets and coat. At the same time, Mishcka was aware that Schneider was arresting Welch for possession of drug paraphernalia. Mischka asked Jones if he had any weapons and Jones responded that he did not. Mischka then conducted a patdown search of Jones. Just prior to or simultaneous with this search, Mischka became aware that Schneider arrested Welch. During Mischka's search of Jones, Mischka saw something with a rounded end sticking out of Jones's shoe. He thought it was a knife but when he pulled it out found it was a pipe. The pipe contained a substance that smelled like marijuana. Mischka testified that he could not recall if he would have found the pipe without the patdown because it was not visible.

¶5 Mischka arrested Jones for possession of drug paraphernalia and asked Jones his name. Jones again responded his name was Dean Sexton. As Mischka was about to run the name on the computer, Jones admitted he lied and gave his real name. Jones was ultimately charged with possession of drug paraphernalia as well as obstructing an officer. Jones moved to suppress the pipe as well as evidence that he gave a false name. The court denied the motion. Jones then pled no contest to both counts. He was sentenced to twenty days in jail on each count, to be served concurrently, plus costs and fees. His driver's license was also suspended for six months. The sentence was stayed pending appeal.

DISCUSSION

¶6 Jones argues the circuit court erred in determining that Mischka had reasonable suspicion that Jones was armed and therefore his search of Jones was warranted. However, Jones contends the search was based simply on Mischka's

observation that Jones was nervous, and that this is not sufficient to establish reasonable suspicion that he was armed.

¶7 Courts determine whether a patdown search is reasonable by balancing the government's need to conduct the search against the invasion the search entails. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). Our supreme court has held that:

> protective frisks are justified when an officer "has a reasonable suspicion that a suspect may be armed." The "reasonable suspicion" must be based upon "specific and articulable facts," which, taken together with any rational inferences that may be drawn from those facts, must establish that the intrusion was reasonable.
>
> The reasonableness of a protective frisk is determined based upon an objective standard. That standard is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger." We apply this standard in light of the "totality of the circumstances."

State v. McGill, 2000 WI 38, ¶¶22-23, 234 Wis. 2d 560, 609 N.W.2d 795 (citations omitted).

¶8 In reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Williamson***, 113 Wis. 2d 389, 401, 335 N.W.2d 814 (1983). We then independently review those facts to determine whether the constitutional requirement of reasonableness is satisfied. ***Id.***

¶9 We conclude that based on the totality of the circumstances, Mischka did not have reasonable suspicion that Jones might be armed. First, this was a traffic stop for speeding, a relatively minor offense that does not ordinarily

arouse suspicion that someone might be armed. The purpose of a stop is a factor in determining reasonableness of a search. *See* ***State v. Guy***, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992) (search reasonable where the officer had found weapons in most cases while executing search warrants for drugs and weapons are a tool of the drug trade).

¶10 Furthermore, the fact that Mischka and Schneider left Jones and Welch unattended for a period of time while they returned to the squad shows they did not consider Jones and Welch dangerous. *See e.g.,* ***State v. Mohr***, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186. Mohr was a passenger in a vehicle stopped for suspicion of operating while intoxicated. ***Id.***, ¶¶1, 3. Twenty-five minutes after the traffic stop, Mohr was given a patdown search. ***Id.***, ¶15. Upon review of a motion to suppress, we held that there was no reasonable suspicion that Mohr was armed. We noted:

> apparently, the officer was not concerned for his safety when he initially made the traffic stop because he did not order the passengers out of the vehicle. Nor was he concerned about his safety when he left the vehicle and its passengers unattended while spending twenty minutes with the driver and [another passenger].

Id., ¶16. Similarly here, Mischka did not appear to be concerned for his safety when he and Schneider were in Schneider's squad preparing the speeding ticket. Jones and Welch were left unattended during this time. As we concluded in ***Mohr***, the time between the initial stop and the search is a factor to consider in evaluating the totality of the circumstance. ***Id.***

¶11 Nor was there evidence that Jones was armed after Mischka and Schneider returned to Welch's vehicle. Mischka testified that Jones appeared nervous, but acknowledged that, "there is a normal nervousness in a traffic stop

for everybody." Furthermore, there is no indication that there was anything in Jones's behavior after he exited the vehicle that might have given Mishcka concern for his safety. In fact, Jones complied with Mischka's request that he take his hands out of his pockets. Mischka also testified that he could not recall if he would have found the pipe in Jones's shoe without the patdown. Thus, Mischka did not have a plain view of the pipe, which could have justified the search. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994) (a seizure following a plain view is not the product of a search).

¶12 The State argues that Mischka was aware that Schneider arrested Welch for a drug related offense, and that this gave Mischka reasonable suspicion that Jones might be armed. However, Mischka did not testify that his search of Jones was based on Welch's arrest, but because Jones appeared nervous. Moreover, Mischka testified that he had already begun patting Jones down when he heard that Schneider found drug paraphernalia in the vehicle. Therefore the discovery of drug paraphernalia was not a factor in Mischka's decision to search Jones.

¶13 There was no objective evidence Jones was armed, and the search was based primarily on Mischka's observation of Jones's nervousness. Consequently, based on the totality of the circumstances, a reasonable officer would not have had reasonable suspicion that Jones was armed to justify the search. Therefore, the evidence resulting from the search should have been suppressed.

¶14 The State argues that even if there was no reasonable suspicion to justify the search, and the pipe must be suppressed, Jones's statements regarding his identity should not be suppressed. We agree.

¶15 Under WIS. STAT. § 946.41, "[w]hoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor." Jones does not argue that he did not knowingly resist or obstruct the officers, or that the officers were not acting in an official capacity, but that the officers were acting without lawful authority. Jones contends that any link between the first time he gave a false name and the traffic stop was severed when Schneider ended the traffic stop, although he subsequently reinstated it. The second time Jones gave a false name was after the search in which Mischka found the pipe. Jones argues that this false identification should be suppressed along with the pipe as fruit of an unlawful search.

¶16 During a valid traffic stop a police officer can ask questions, request identification, and ask for consent to search without reasonable suspicion that is separate from the underlying stop. ***Florida v. Bostick***, 501 U.S. 429, 434-35 (1991). Furthermore,

> when a passenger has been seized pursuant to a lawful traffic stop, the seizure does not become unreasonable under the Fourth Amendment or art. 1, § 11 simply because an officer asks the passenger for identification during the stop. Passengers are free to decline to answer such questions, and refusal to answer will not justify prosecution nor give rise to any reasonable suspicion of wrongdoing. However, if a passenger chooses to answer but gives the officer false information, the passenger can be charged with obstructing an officer in violation of Wis. Stat. § 946.41(1).

State v. Griffith, 2000 WI 72, ¶65, 236 Wis. 2d 48, 613 N.W.2d 72.

¶17 Jones does not contend that the traffic stop was unlawful. Therefore, Schneider and Mischka were acting with lawful authority when they asked Jones for identification. Jones chose to give the officers a false name. Knowingly

providing false information with intent to mislead is obstruction as a matter of law. ***State v. Caldwell***, 154 Wis. 2d 683, 688, 454 N.W.2d 13 (Ct. App. 1990).

By the Court.—Judgment affirmed in part; reversed in part.

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