COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3333-CR **Cir. Ct. No. 2004CF127**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NADANIEL P. JONES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 SNYDER, P.J.[1] Nadaniel P. Jones appeals from judgments of conviction for two misdemeanors, possession of cocaine and possession of marijuana, both as party to a crime and as a habitual offender. He contends that the court erred when it denied his motion to suppress evidence collected during the search of a vehicle in which he was a passenger. We disagree and affirm the judgments of conviction and the order denying Jones's motion to suppress.

FACTS

¶2 On March 20, 2004, Officer Eric Halbach of the Fond du Lac County Sheriff's Department stopped a vehicle for speeding on Highway 41. Halbach identified the driver as Travis Eckstein and observed that there were also two male passengers in the vehicle. During the course of the traffic stop, Halbach noticed that Eckstein's eyes were red and glassy. Halbach asked Eckstein if he had been drinking, and Eckstein answered that he had not. Eckstein offered to take a breath test. Halbach then asked Eckstein's passengers to identify themselves. The man in the backseat was Jones.

¶3 Halbach then returned to his patrol vehicle to issue the traffic citation for Eckstein and to request backup from Officer Jason Fabry. At the motion hearing, Halbach stated that he requested backup because "there was something suspicious with the vehicle." He said that he "could smell some sort of incense that was in the vehicle" and repeated his concern about Eckstein's red and glassy eyes. Halbach explained that the smell of incense suggested that the vehicle's occupants were trying to cover up some sort of odor.

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

¶4 Fabry arrived as Halbach completed Eckstein's traffic citation. Upon returning to the vehicle, Halbach asked Eckstein to step outside and walk over to the patrol car where Fabry conducted a preliminary breath test (PBT). The PBT result was .00 grams, indicating that Eckstein had not been drinking. Halbach then issued the traffic citation to Eckstein and explained the court date, the cost, and what Eckstein's options were.

¶5 Halbach considered the .00 grams PBT result to be out of the ordinary in light of Eckstein's red and glassy eyes. Fabry then asked Eckstein if anyone else in the vehicle had been drinking. Eckstein answered "no" and stated that the officers could give his passengers PBTs if they wished. Halbach asked Eckstein for permission to search the vehicle, and Eckstein refused.

¶6 Fabry walked to the vehicle to talk to the passengers while Halbach and Eckstein were talking. Fabry spoke to the front seat passenger, Paul Pacheco, whose window was rolled down. Fabry noticed that Pacheco had red, glassy eyes and he detected an odor of alcohol on Pacheco's breath. Pacheco denied that he had been drinking. Fabry also noticed "quite a few air fresheners" on the dashboard and floorboard of the front seat. Eventually, Fabry noted the odor of burnt marijuana coming from the vehicle.

¶7 Fabry asked Pacheco to exit the vehicle. He noticed even more air fresheners alongside the passenger seat, underneath the seat, and in the door frame. Fabry administered a PBT, and Pacheco registered .03 grams. Halbach took Pacheco to a squad car and Fabry went back to talk to the backseat passenger, Jones. Fabry asked Jones if he had been drinking, and Jones answered that he had but that it would probably not register on any test. Fabry noted that Jones's eyes

were red and glassy. Fabry administered a PBT, which Jones passed with a result of .00 grams.

¶8 Fabry told Halbach what he had smelled in the vehicle and then went to talk to Eckstein. Fabry explained to Eckstein that he smelled burnt marijuana inside the vehicle and that one of the passengers had been drinking.[2] He asked Eckstein for permission to search the vehicle, but Eckstein refused to consent to a search. Fabry then advised Eckstein that based on the odor of burnt marijuana and that a passenger under the age of twenty-one had been drinking, he would search the vehicle anyway. Fabry stated that he searched the vehicle without Eckstein's consent to see if there was marijuana or any other narcotic in the vehicle and to see if there was any alcohol left inside the vehicle. The search uncovered marijuana, crack cocaine, and a firearm.

¶9 Jones moved to suppress the evidence, arguing that the search of the vehicle was illegal. The circuit court denied Jones's motion. Subsequently, Jones pled guilty to two misdemeanors, possession of cocaine and possession of marijuana, both as party to the crime and as a habitual offender. On appeal from the judgments of conviction, Jones challenges the denial of his suppression motion pursuant to WIS. STAT. § 971.31(10).[3]

[2] The parties do not dispute that all three occupants of the vehicle were under the legal drinking age.

[3] Under WIS. STAT. § 971.31(10), a defendant may appeal from an order denying a motion to suppress even where the judgment of conviction rests on a plea of guilty. ***State v. Kazee***, 192 Wis. 2d 213, 219 n.4, 531 N.W.2d 332 (Ct. App. 1995).

DISCUSSION

¶10 Our supreme court has stated that "all occupants of a vehicle possess a reasonable expectation of privacy, under the Fourth Amendment and art. I, sec. 11, to travel free of any unreasonable governmental intrusion." ***State v. Harris***, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996). When police stop a vehicle, all of the occupants of that vehicle have standing to challenge the seizure. ***Id.*** at 257. Whether an officer's actions following a traffic stop violate a defendant's right to be free from unreasonable search and seizure presents a question of constitutional fact. ***State v. Malone***, 2004 WI 108, ¶14, 274 Wis. 2d 540, 683 N.W.2d 1. The circuit court's findings of evidentiary fact will be upheld unless clearly erroneous; however, we independently apply those facts to the constitutional standards. ***Id.***

¶11 Jones does not challenge the initial stop of the vehicle. The focus of his appeal is on what occurred after the speeding ticket was issued. At that point, Jones argues that "the purpose of the seizure – investigation of a traffic violation – was completed and the continued detention of the vehicle and its occupants became unlawful." He contends that Fabry and Halbach unconstitutionally detained the vehicle and its occupants on a mere hunch. *See* ***Terry v. Ohio***, 392 U.S. 1, 21-22, 27 (1968) (an officer's hunch is insufficient to give rise to reasonable suspicion). Jones further contends that even if the continued detention of the vehicle is supported by reasonable suspicion, the officers did not have probable cause to conduct a warrantless search of the vehicle.

¶12 Jones does not contest Halbach's authority to ask Eckstein if he had been drinking or to administer a PBT. Jones acknowledges that Halbach observed Eckstein's red and glassy eyes during the course of the traffic stop. Rather, Jones

urges us to assess whether the extended investigation was "reasonably related in scope to the circumstances which justified the interference in the first place." ***Malone***, 274 Wis. 2d 540, ¶24 (quoting ***Terry***, 392 U.S. at 20). He asserts that because Eckstein told Halbach he had not been drinking and the PBT confirmed it, "Any belief that the passengers were drinking or using drugs was mere guesswork, unsupported by any articulable factors."

¶13 The record suggests otherwise. Halbach testified that Eckstein had red, glassy eyes and that an odor of incense emanated from the vehicle. Halbach called for backup because the smell of incense made him suspect that the occupants of the vehicle were trying to mask another odor. Based on his training and personal experience, Halbach knew that air fresheners can be used to mask the odor of marijuana or burnt marijuana. When Fabry arrived on the scene, Halbach told him that the occupants of the vehicle were acting nervous. Fabry administered a PBT to Eckstein, which eliminated alcohol as the cause for the appearance of Eckstein's eyes. Fabry testified that "[u]sually if you see somebody who has red, glossy eyes, either it's because [of] alcohol or narcotics. Usually marijuana."

¶14 Jones aligns himself with ***Illinois v. Caballes***, ___ U.S. ___, 125 S. Ct. 834, 837 (2005), where the United States Supreme Court stated that a lawful seizure in the course of a traffic stop can become unlawful "if it is prolonged beyond the time reasonably required to complete that mission." Here, however, the officers observed the condition of the occupants' eyes, their nervous demeanor, and the odor in the vehicle during the course of the lawful traffic stop. "[I]f during a valid traffic stop, an officer becomes aware of suspicious factors or additional information that would give rise to an objective, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter simply

because further investigation is beyond the scope of the initial stop." ***Malone***, 274 Wis. 2d 540, ¶24; ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). In a factual situation such as the one presented here, "there may not be a distinct line separating the two investigations—the first investigation may overlap the second without any outward indication of a shift." ***Malone***, 274 Wis. 2d 540, ¶24. We conclude that Halbach and Fabry provided specific, articulable facts to support the reasonable suspicion that criminal activity was afoot.

¶15 Jones argues that even if the officers lawfully extended their investigation beyond the scope of the traffic stop, they had no probable cause to search the vehicle. A warrantless search of a vehicle is lawful if police have probable cause to believe that the vehicle contains evidence of a crime. ***State v. Secrist***, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). Furthermore, the unmistakable odor of marijuana coming from an automobile provides probable cause to believe that the vehicle contains evidence of a crime. ***Id.***

¶16 Jones attempts to distinguish his case from the facts of ***Secrist***, noting that here only one of the two investigating officers—Fabry—detected an odor of marijuana and that the circuit court found it "to some extent problematic" that there was no testimony as to the strength of the odor. Jones argues that under these circumstances the "odor [of marijuana] was not strong and not unmistakable."

¶17 The State responds that although the odor may not have been described as strong or unmistakable, Fabry did identify the odor as burnt marijuana. In ***Secrist***, our supreme court cited with approval another court's holding that the "odor of burnt marijuana creates an inference that marijuana is not

only physically present in the vehicle, but that some of it has been smoked recently." ***Id.*** at 210-11 (citing ***State v. Judge***, 645 A.2d 1224, 1228 (N.J. 1994)). Furthermore, Fabry had other facts to support probable cause, including the presence of numerous air fresheners in the vehicle, the red and glassy eyes of all three occupants, and the nervous demeanor of the occupants.

CONCLUSION

¶18 The quantum of evidence presented by the State is sufficient to establish that probable cause to search the vehicle was present. The circuit court properly denied Jones's motion to suppress the physical evidence obtained during the search. Therefore, we affirm the order denying Jones's motion to suppress and the judgments of conviction.

By the Court.—Judgments and order affirmed.

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