COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP23-CR **Cir. Ct. No. 2002CF3101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARSHALL R. REESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Marshall R. Reese appeals from a judgment entered after a jury found him guilty of unlawfully possessing five grams or fewer of cocaine,

with intent to deliver, and battering a law enforcement officer.[1] *See* WIS. STAT. §§ 961.41(1m)(cm)1, 940.20(2) (2001–02). He also appeals from an order denying his motion for postconviction relief. Reese claims that: (1) the State destroyed exculpatory evidence; (2) his trial lawyer was ineffective; and (3) the trial court erroneously exercised its sentencing discretion when it sentenced him to nine years in prison, with four years of initial confinement and five years of extended supervision on the possession-of-cocaine charge, and two years in prison with one year of initial confinement and one year of extended supervision on the battering-a-law-enforcement-officer charge, consecutive to the first sentence. We affirm.

I.

¶2 This case began in June of 2002, when Reese tried to run away from police officers after they stopped a car in which he was a passenger, and caught him with fourteen corner cuts of cocaine. Reese claimed that the police did not have probable cause to stop the car, and that, therefore, the cocaine had to be suppressed.

¶3 At a hearing on Reese's motion, Officer Richard Tank testified that the night they arrested Reese, he saw a Chevrolet Corsica with taillights that were not lit driving in the 3100 block of North Tenth Street in Milwaukee at 12:42 a.m. According to Tank, the car drove north on North Tenth Street, east through an

[1] Reese was also charged with a second count of battering a law enforcement officer and attempting to disarm a peace officer. *See* WIS. STAT. §§ 940.20(2), 941.21 (2001–02). The jury was unable to reach a verdict on the second battery-to-a-law-enforcement-officer charge, and acquitted Reese of the attempting-to-disarm-a-peace-officer charge.

alley, and south onto North Ninth Street, which was "fairly dark." Tank testified that he and his partner decided to stop the car because the taillights were out. According to Tank, after they stopped the car, he:

> informed the driver that I was Police Officer Tank of the Milwaukee Police Department, informed him of the reason I was stopping him, for not having any operating tail lamps. I asked the driver and the passenger why they weren't wearing seatbelts and then proceeded with I.D. from the driver and the name from the passenger.

Tank testified that after Reese gave them his name, he and his partner did a "wanted check" and discovered that Reese had a warrant for violating his parole. Tank and his partner then asked Reese to get out of the car. According to Tank, Reese pushed his partner and started to run away. Tank told the trial court that they struggled, and that Tank and his partner called for backup. The criminal complaint alleges that it took six police officers to subdue Reese.

¶4 Reese testified that after the car was pulled over Tank told the driver: "'You guys know you're not supposed to be driving through the alley this late at night.'" Reese claimed that Tank did not say anything about broken taillights or seatbelts, and claimed that he was wearing his seatbelt.

¶5 The trial court denied Reese's motion, finding credible Tank's testimony. It concluded that the police had a "sufficient basis to pull the car over" under WIS. STAT. § 968.24 (temporary questioning without arrest), and ***State v. Krier***, 165 Wis. 2d 673, 478 N.W.2d 73 (Ct. App. 1991) (reasonable suspicion for investigative stop).[2]

[2] WISCONSIN STAT. § 968.24 provides:

(continued)

¶6 In August of 2002, and November of 2002, Reese filed motions seeking, among other things, "the 1989 Chevrolet Corsica … in which [he] was a passenger." At a hearing on November 20, 2002, the assistant district attorney told the trial court that the car was no longer available:

> The third item is whether this 1989 Chevrolet Corsica is -- was impounded by the Milwaukee Police Department, and if it was, whether it's still available. I don't know really what impounded means, but the car was towed. It was in the tow lot. It was towed on June 5, the date of this event. It sat in the tow lot for 15 days.… After 15 days the car [wa]s tagged for removal and recycling. Shortly after that the car was taken to Miller Compressing, and on June 21st … the car was recycled, crushed, and/or shredded. That's what [an o]fficer of the Milwaukee Auto Squad told me.

¶7 Reese's postconviction motion claimed that: (1) the State violated his due-process rights when it destroyed the car; (2) his trial lawyer was ineffective because the lawyer did not "promptly" file a motion to preserve the car for testing; and (3) the trial court erroneously exercised its sentencing discretion. He submitted an affidavit averring, among other things, that:

- On the day of his preliminary hearing, some nine days after he was arrested, he learned that the police had stopped the car because the taillights were not working.

> **Temporary questioning without arrest.** After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

- He then told his trial lawyer that the taillights were working on the night he was arrested "because he saw them in operation when he got into the car."

- He asked his trial lawyer to "have the vehicle's tail lights tested so as to prove his assertion" that they were working.

- He did not "consent" to his trial lawyer's "failure to file a Motion to Preserve the car for scientific testing."

The trial court denied Reese's motion without a hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We address Reese's contentions in turn.

II.

A. *The Car.*

¶8 A defendant's due-process rights are violated if the police: (1) do not preserve evidence that is apparently exculpatory, or (2) act in bad faith by not preserving evidence that is potentially exculpatory. ***Arizona v. Youngblood***, 488 U.S. 51, 57–58 (1988); ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294, 297 (1994).

¶9 Reese claims that the State violated the first standard. Under this standard: (1) the evidence must have had exculpatory value that was apparent before the evidence was destroyed, and (2) the defendant would be unable to get comparable evidence by other reasonable means. ***California v. Trombetta***, 467 U.S. 479, 489 (1984); ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463, 465 (Ct. App. 1985).

¶10 Regarding the first part, Reese argues that the car "possessed a clear and obvious exculpatory value" because it supports his claim that the police stopped the car for driving through an alley. He contends that, had the car not been destroyed, he would have been able to show that the taillights were working and that the police did not have a reason to stop the car. We disagree.

¶11 First, the car's apparent exculpatory value when it was destroyed was *de minimis* at best. Although, as we have seen, Reese contended that "he knew the tail lights were working because he saw them in operation when he got into the car on June 5, 2002," this does not necessarily mean that they were working when the police saw the car. Indeed, the trial court found Tank's testimony to be credible and Tank, as we have seen, testified that the taillights were not working when they stopped the car. *See* ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980) (determination of witness credibility left to trial court). This finding was not clearly erroneous. *See* ***id.***, 95 Wis. 2d at 152, 289 N.W.2d at 818 (clearly erroneous standard). Simply put, the taillights could have been both working when tested and not working when the officers stopped the car, especially in a car whose owner apparently thought it had such little value that the owner did not retrieve it from the lot to which it was towed. Thus, we do not discuss whether Reese could have gotten by other reasonable means evidence comparable to what he claims might be shown by testing the car sometime after he was arrested. *See* ***Oinas***, 125 Wis. 2d at 491, 373 N.W.2d at 465.

¶12 Second, irrespective of whether the taillights were or were not working when the officers stopped the car, the police lawfully stopped it for cutting through an alley. *See* ***Whren v. United States***, 517 U.S. 806, 813 (1996) (lawfulness of a stop is an objective analysis that does not depend on an officer's

subjective belief). Going through an alley at approximately 12:45 in the morning rather than using the next cross street legitimately triggered an objective concern that "criminal activity may [have] be[en] afoot." *See* ***Terry v. Ohio***, 392 U.S. 1, 30 (1968); *see also* ***United States v. Sokolow***, 490 U.S. 1, 7 (1989) (probable cause not required). Once Tank walked over to the car and saw that Reese and the driver were unlawfully not wearing their seatbelts, he had a right to ask Reese for his name in order to issue the forfeiture authorized by statute. *See* WIS. STAT. §§ 347.48(2m) (required use of safety belts); 347.50(2m) (forfeiture for violating § 347.48(2m)).[3] Reese's attempted flight and subsequent struggle with the officers permitted them to arrest and search him. *See* ***Illinois v. Wardlow***, 528 U.S. 119, 124–125 (2000).

[3] WISCONSIN STAT. § 347.48(2m) provides, as material:

> **(2m)** REQUIRED USE.
>
> ….
>
> (b) If a motor vehicle is required to be equipped with safety belts in this state, no person may operate that motor vehicle unless the person is properly restrained in a safety belt.
>
> ….
>
> (d) If a motor vehicle is required to be equipped with safety belts in this state, no person who is at least 4 years old and who is seated at a designated seating position in the front seat required under 49 CFR 571 to have a safety belt installed or at a designated seating position in the seats, other than the front seats, for which a shoulder harness has been installed may be a passenger in that motor vehicle unless the person is properly restrained.

B. *Ineffective Assistance.*

¶13 Reese claims that his trial lawyer was ineffective because the lawyer did not seek to preserve the car as evidence. He contends that the lawyer's failure to "promptly" file a motion to preserve the car "allowed the destruction of evidence that was both exculpatory and, literally, irreplaceable," because it could have been used to challenge the existence of probable cause for the stop. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance must prove deficient performance and that he or she suffered prejudice as a result). We disagree.

¶14 As we have seen, the police had reasonable suspicion to stop the car, irrespective of whether the taillights were working. Accordingly, contrary to Reese's additional, albeit related, contention, the trial court did not err in not holding a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437 ("if the motion does not raise facts sufficient to entitle the movant to relief … the [trial] court has the discretion to grant or deny a hearing").

C. *Sentencing.*

¶15 Reese claims that the trial court erroneously exercised its sentencing discretion when, according to Reese, it "viewed the fact that Mr. Reese exercised his constitutional right to testify in his own behalf and protested his innocence to be proof of 'bad character' justifying the imposition of a more severe sentence." We disagree.

¶16 The trial court did not penalize Reese for exercising his right to testify at the trial. Rather, it considered the fact that Reese lied to the jury and to

the pre-sentence-investigation-report writer about possessing the cocaine as an appropriate reflection on Reese's character:

> [T]he issue here is he denied that cocaine possession at all, and implied, although he didn't flat out state, but implied to the jury that the police suggested, led them to believe, led them in the direction of trying to think that the police planted the cocaine on him.
>
> Now, in the pre-sentence, he says, he stated that he denied having drugs on him because the police lied on him. This shows criminal thinking. First of all the police did not lie on him, they did not lie about this, and second his way of thinking is, well, I can lie because somebody lied on me. Well, number one, they didn't lie on you, sir, okay, and number two, they didn't plant any drugs on you, and number three, your belief that you're entitled to lie on them is an example of criminal thinking and shows bad character. But again, I am only considering what he told the jury on count one as showing bad character, but I think that shows very bad character.

See ***Lange v. State***, 54 Wis. 2d 569, 575, 196 N.W.2d 680, 684 (1972) (trial court's appraisal of defendant's attitude, including his or her veracity at trial, is highly relevant to exercise of sentencing discretion). Further, the trial court considered all of the appropriate factors, and other than his unsupported claim that the trial court penalized him for exercising his right to testify, Reese does not contend otherwise.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.