COURT OF APPEALS DECISION DATED AND FILED

April 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2326-CR

Cir. Ct. No. 2004CF673

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY T. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Anthony Jones appeals from a judgment of conviction for misdemeanor possession of THC as a second offense under WIS.

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

STAT. § 961.41(3g)(e) and from an order denying his motion to suppress evidence. Jones contends that the trial court erred in denying his motion because police lacked reasonable suspicion to initiate a traffic stop and investigation based solely on a police memo that did not explicitly authorize a stop. He further contends police lacked probable cause to arrest him, and thus evidence of marijuana possession found in his vehicle during the search incident to the arrest should have been suppressed. Because we conclude that there was reasonable suspicion to stop Jones based on an objective reading of the memo, and the subsequent arrest was reasonable because the investigator who issued the memo had probable cause to believe that Jones was a party to the crime of battery, we affirm the trial court's denial of Jones' motion to suppress and its judgment of conviction.

Background

¶2 On October 28, 2004, Officer Teri Roden made a traffic stop of a vehicle driven by Anthony Jones, whom Roden recognized from previous unrelated contacts. Roden's sole basis for the stop was a police department internal memo issued by Investigator Marion Byerson, the contents of which we discuss momentarily.

¶3 Upon making the stop of Jones' vehicle, Roden radioed the dispatcher to receive instructions from Byerson about how to proceed with Jones. The dispatcher informed Roden that Byerson wanted Jones placed under arrest for battery. Roden arrested Jones and searched his vehicle, finding approximately ten cigar blunts of marijuana in the ashtray. Jones was subsequently charged with second-offense marijuana possession and other unrelated crimes.

¶4 Jones moved to suppress the evidence gathered from the search of his vehicle, contending that Roden lacked reasonable suspicion to initiate the stop

of his vehicle and that she lacked probable cause to arrest him for battery. The trial court held an evidentiary hearing at which Byerson testified about his investigation of an alleged October 10, 2004 battery that was the basis for his memo. Byerson testified that the victim of the alleged battery told him that a vehicle carrying several passengers pulled alongside her vehicle. The victim said that one person in the car pointed a gun at her. She told Byerson that she got out of her vehicle and was approached by several individuals coming out of the other car. She said that one man and a few women attacked and beat her, another person held a gun to her head and others held her down. She stated that everyone in the other car participated in the battery in some way.

¶5 Byerson testified that he spoke to other individuals about the alleged battery, including a woman who admitted to attacking the victim. This woman stated that Jones was involved in the battery. Byerson testified that he spoke to another person who admitted to beating the victim and indicated that Jones was involved in the incident. Byerson testified that he then "interviewed some other people that [said] Mr. Jones was involved in a fight." When asked what Jones did specifically, Byerson stated that "[h]e was standing there while they were putting a hold to [the victim]." He added that Jones "was one of the individuals seated in the back, and the information [from witnesses] was that … one of the people in the back had gotten out and had the hand gun that was pointed at the victim."

¶6 On October 20, 2004, Byerson issued the police department memo that Roden relied upon to stop Jones' vehicle. It contained the names and photos of individuals (including Jones) Byerson was seeking and the charge or charges for which they were being sought. Roden testified that the memo stated that Byerson was "looking for" Jones and the other individuals. The memo is not a part of the appellate record.

¶7 The trial court denied Jones' motion, concluding that Roden, via Byerson's investigation of the alleged battery, had evidence sufficient to support a reasonable suspicion to stop Jones' vehicle and probable cause to arrest Jones on the charge of battery. Jones subsequently pled guilty to one count of second-offense possession of marijuana. He appeals from the denial of his motion to suppress evidence and the judgment of conviction.

Standard of Review

¶8 When reviewing a denial or grant of a motion to suppress, we will uphold a trial court's findings of fact unless they are clearly erroneous. ***State v. Rome***, 2000 WI App 243, ¶14, 239 Wis. 2d 491, 620 N.W.2d 225. Whether a seizure passes the constitutional test of reasonableness is a question of law that we review de novo. *See* ***State v. Ferguson***, 2001 WI App 102, ¶8, 244 Wis. 2d 17, 629 N.W.2d 788.

Analysis

¶9 The Fourth Amendment to the United States Constitution states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... but upon probable cause." However, ***Terry v. Ohio***, 392 U.S. 1, 21 (1968) permits a temporary detention of a person when reasonable suspicion exists that crime is afoot. Reasonable suspicion is present when "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." ***Id.*** Wisconsin codified ***Terry*** in WIS. STAT. § 968.24.

¶10 Jones contends that Officer Roden lacked a good-faith basis to stop him because the memo on which Roden relied did not instruct officers to stop him.

Alternatively, he asserts that even if Byerson's memo provided Roden a sufficient basis for her actions against Jones, the department lacked probable cause to arrest him. We address each of these contentions in turn.

¶11 In ***United States v. Hensley***, 469 U.S. 221, 232 (1985), the United States Supreme Court held that a police memo (or similar communication such as a flier or bulletin) may provide a basis for a ***Terry*** stop even when the officer initiating the stop lacks personal knowledge of the specific facts justifying the stop. Such a memo will permit a stop when an objective reading of the memo supports the conclusion that a stop is authorized, and the person issuing the memo possessed sufficient facts to establish a reasonable suspicion of past criminal activity. *See* ***Hensley***, 469 U.S. at 230-33. Quoting ***United States v. Robinson,*** 536 F.2d 1298, 1299, 1300 (9th Cir. 1976), the ***Hensley*** court explained that "effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." ***Id.*** at 231.

¶12 In ***Hensley***, officers testified they recalled that the memo specifically requested a stop for investigation. ***Id.*** at 224. Here, Jones contends that because testimony failed to establish that the memo had instructed officers to stop Jones, the memo was not susceptible to an objective reading that a stop was warranted. We disagree.

¶13 While the bulletin in ***Hensley*** specifically sought a stop for investigation, ***Hensley*** did not hold that a bulletin must contain this explicit instruction for an officer to make a stop in reliance on the bulletin. Rather, the ***Hensley*** court concluded that the test for whether an officer may act upon the

memo (or flyer or bulletin) is whether it may be objectively read to support the officer's action. ***Id.*** at 232-33. The "objective reading" test considers whether the communication, as a whole, supports the inference that a stop is warranted; the test does not require the use of certain legal terms of art ("investigative stop" or "reasonable suspicion") or explicit commands. Here, the police investigator's memo contained photos of individuals, associated each with specific crimes and indicated that the investigator was "looking for" these persons. We conclude that, based on uncontroverted testimony about the memo's contents, the memo may be objectively read to indicate that a traffic stop was warranted. Therefore, on its face, the memo provided a reasonable basis for Roden's stop of Jones.[2]

¶14 Though no Wisconsin court nor the U.S. Supreme Court has addressed the precise situation in this case, we find some persuasive support for our conclusion from other jurisdictions. In ***State v. Krebs***, 504 N.W.2d 580, 586 (S.D. 1993), the South Dakota Supreme Court determined that a flyer the court described as indicating that police were "on the lookout" for suspects could be objectively read to authorize an investigative stop. *See also* ***Dykhouse v. Mugge***, 735 F. Supp. 1377, 1379 (C.D.Ill. 1990) (concluding that officer making an investigative stop could objectively rely on a police bulletin stating that driver of a tractor was wanted for reckless driving though the bulletin did not instruct officers to make a stop).

[2] Because we later determine that Byerson possessed sufficient evidence supporting probable cause to arrest Jones for the crime of battery, we conclude that this same evidence was more than sufficient to constitute reasonable suspicion, a lower standard of proof, for Roden to conduct the traffic stop of Jones.

¶15 We turn now to Jones' contention that Roden lacked probable cause to arrest him. Preliminarily, we observe that because Roden, upon making the stop, was instructed by Byerson via the dispatcher to arrest Jones, the question of whether an objective reading of the memo would have supported the arrest is irrelevant. What remains for us to decide is whether Byerson had sufficient evidence concerning Jones' involvement in the alleged battery to constitute probable cause. If Byerson had probable cause, Roden's arrest of Jones on Byerson's instruction was permissible. *See* ***Hensley***, 469 U.S. at 231, *discussing* ***Whiteley v. Warden***, 401 U.S. 560, 568 (1971) (admissibility of evidence "turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest").

¶16 When determining whether probable cause exists to arrest a person, we inquire as to

> what a reasonable police officer would reasonably believe under the circumstances …. Probable cause is assessed by looking at practical considerations on which reasonable people, not legal technicians, act. Probable cause does not mean more likely than not. It is only necessary that the information support a reasonable belief that guilt is more than a possibility.

State v. Erickson, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407 (citations omitted). A person commits a crime when he or she aids and abets the direct actor of a crime. *See* WIS. STAT. § 939.05.[3] Quoting with approval a former version of the pattern jury instruction for the aiding and abetting statute, the supreme court explained as follows:

[3] WISCONSIN STAT. § 939.05(2) states in pertinent part that "a person is concerned in the commission of the crime if the person: (a) Directly commits the crime; or (b) Intentionally aids and abets the commission of it."

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either
>
> (a) renders aid to the person who commits the crime, or
>
> (b) is ready and willing to render aid, if needed, and the person who commits the crime knows of his willingness to aid him.

State v. Martinez, 150 Wis. 2d 47, 52 n.3, 441 N.W.2d 690 (1989) (citations omitted).

¶17 We conclude that Byerson's investigation of the alleged battery yielded evidence that Jones was probably a party to the crime of battery. Byerson testified that a woman who had admitted to attacking the victim told him that Jones was involved in the battery. A second person who confessed to beating the victim also told Byerson that Jones was involved. Byerson testified that other witnesses said Jones was present and was seated in the back of the gun-carrying attacker's car. The cumulative effect of this evidence supports probable cause to believe Jones committed the crime of battery as a party to the crime. Thus, Roden's arrest and her search of the vehicle incident to the arrest were reasonable, and the evidence supporting Jones's conviction for possession of THC was properly not suppressed.

¶18 In sum, we conclude that Roden's investigative stop of Jones was permissible under an objective reading of Byerson's memo. We further conclude that Roden's arrest of Jones was reasonable because Byerson possessed evidence constituting probable cause to believe that Jones was a party to the crime of battery. Accordingly, we conclude that the search incident to Jones' arrest was reasonable, and thus the trial court properly denied Jones' motion to suppress

evidence of marijuana possession discovered during the search. We therefore affirm the trial court's order denying the motion to suppress evidence and its judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.