COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP170-CR **Cir. Ct. No. 2005CF130**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOHN C. ZITTLOW, P/K/A JOHN C. STEIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State of Wisconsin appeals an order granting John Zittlow's motion to suppress evidence and dismissing pending charges against him. The State asserts the court erred when it concluded a search of Zittlow's vehicle incident to the arrest of one of his passengers was a Fourth

Amendment violation. Because there is a bright-line rule permitting searches of vehicles incident to lawful arrests, we reverse the order and remand the case to the circuit court for further proceedings.

¶2 The relevant facts are undisputed. Shawano County Deputy Sheriff Wade Wudtke stopped Zittlow for speeding. Zittlow had two passengers, Kathleen Stein and Nicole Price. Stein was in the front passenger seat and Price was in the back seat. Wudtke ran all three occupants' identifications through dispatch, which informed Wudtke that Price had multiple warrants out for her arrest. Wudtke gave Zittlow a written warning for speeding, explained that he would be arresting Price, and further explained that he would be searching the vehicle incident to the arrest.

¶3 When Wudtke searched the vehicle, he found a backpack in the rear seat. When he moved the backpack, Wudtke could smell marijuana and saw a pipe in an open pocket. Wudtke removed the backpack from the car and asked whose it was. Zittlow admitted it was his. In total, Wudtke discovered marijuana, two scales, plastic bags, the pipe, and $1,000 cash in the backpack.

¶4 The State charged Zittlow with one count of possession of marijuana with the intent to deliver, one count of possession of marijuana, and one count of possession of drug paraphernalia. After the preliminary hearing, an Information was filed with the same charges, plus one count of possession of psilocybin with the intent to deliver.

¶5 Zittlow moved to suppress evidence obtained from the search of his vehicle. At the suppression hearing, Wudtke testified he would not have searched the vehicle but for Price's arrest. A stipulation of facts submitted to supplement the evidence from the hearing indicated that Price's warrants were for failure to

pay forfeitures. The court granted the motion to suppress, concluding that Zittlow's constitutional rights had been violated. The court then dismissed the pending charges against Zittlow, since the evidence obtained in the search had formed the basis for the charges. The State appeals.

¶6 Whether a search passes constitutional muster is a question of constitutional fact. *See* ***State v. Pallone***, 2000 WI 77, ¶26, 236 Wis. 2d 162, 613 N.W.2d 568. We review such questions in two steps. ***Id.***, ¶27. First, we apply a deferential standard to the circuit court's findings of evidentiary, historical facts, affirming them unless clearly erroneous. ***Id.*** Second, we review the application of constitutional principles to those facts independently. ***Id.***

¶7 A basic principle of the Fourth Amendment is that it prohibits a search without a warrant supported by probable cause. ***New York v. Belton***, 453 U.S. 454, 457 (1981). There are, however, recognized exceptions to the warrant requirement. For example, in ***Chimel v. California***, 395 U.S. 752, the Supreme Court held that a lawful custodial arrest justified the warrantless search of a person arrested and the immediately surrounding area. *See* ***id.*** at 763; ***Belton***, 453 U.S. at 457. In ***United States v. Robinson***, 414 U.S. 218, the Supreme Court further held that after a lawful custodial arrest, search of the person is not only an exception to the warrant requirement but is reasonable under the Fourth Amendment. ***Id.*** at 235.

¶8 There are multiple historical reasons justifying the search-incident-to-arrest exception. In Wisconsin, these have been codified in WIS. STAT. § 968.11 (2003-04), which states:

> When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area

> within such person's immediate presence for the purpose of:
>
> (1) Protecting the officer from attack;
>
> (2) Preventing the person from escaping;
>
> (3) Discovering and seizing the fruits of the crime; or
>
> (4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

¶9 Prior to ***Belton***, however, the Supreme Court had not discussed the propriety of searching a vehicle's passenger compartment following arrest of the occupants. The ***Belton*** Court ultimately held "when a policeman has made a lawful custodial arrest of the occupant of an automobile … he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and any containers within the passenger compartment. ***Belton***, 453 U.S. at 460.

¶10 Our supreme court adopted ***Belton*** in ***State v. Fry***, 131 Wis. 2d 153, 175, 388 N.W.2d 565 (1986). Analyzing the relationship between WIS. STAT. § 968.11 and ***Belton***, the court explained:

> The statute authorizes searches incident to arrest and then defines the underlying justification for this exception to the warrant requirement. The justification of such a search of the person arrested and an area within the person's immediate presence exist regardless of the officer's subjective intent. In [another case], we specifically recognized that the [S]tate does not have to prove the purpose of a search incident to arrest.

Fry, 131 Wis. 2d at 168-69. The court also concluded the ***Belton*** rule "is a simple and reasonable rule governing the search of an automobile after an arrest is made" and "is a reasonable application of the search incident to arrest exception to the warrant requirement." ***Fry***, 131 Wis. 2d at 174-75.

¶11 Subsequent jurisprudence, and jurisprudence from other jurisdictions, has on occasion questioned whether ***Belton*** created too large an exception to the warrant requirement.[1] However, this court is bound by prior precedent of the state supreme court. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). ***Fry*** and ***Belton*** permit a search of a vehicle's passenger compartment when one of the vehicle's occupants is lawfully arrested, the precise situation here.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[1] Zittlow's reliance on ***Knowles v. Iowa***, 525 U.S. 113 (1998), is misplaced. There was no arrest in that case prior to the search. Zittlow's reliance on ***State v. Malone***, 2004 WI 108, ¶¶17, 34, 274 Wis. 2d 540, 683 N.W.2d 1, is also unavailing. ***Malone***, as relevant here, merely indicates a general disdain for bright-line rules, particularly when "reasonableness" is part of the analysis. It does not, however, overturn existing rules.

Zittlow also suggests that ***State v. Pallone***, 2000 WI 77, ¶42, 236 Wis. 2d 162, 613 N.W.2d 568, created a rule that, if there is a custodial arrest, we must then inquire whether there is nonetheless justification for a search. The mention of looking for an underlying justification for the search went merely to the overall question of whether, under ***Pallone***'s fact situation, a non-arrested passenger's belonging should be exempted from a search incident to arrest when the driver is the one arrested. The court declined to make such an exception.

Indeed, ***Pallone*** expressly recognizes ***New York v. Belton***, 453 U.S. 454, 457 (1981). It also recognizes that "the 'fact of the lawful arrest' establishes the authority to search … [and] this exception does not require a showing that the police officer had probable cause to believe that a vehicle contains contraband." ***Pallone***, 236 Wis. 2d 162, ¶32 (citation omitted). ***Pallone*** further notes that the fact of the arrest itself gives rise to two of the concerns justifying a warrantless search—ensuring officer safety and the need to discover and preserve evidence. ***Id.*** Nowhere does ***Pallone*** explicitly purport to overrule, reject, or otherwise modify ***Fry*** or ***Belton***.