COURT OF APPEALS DECISION DATED AND FILED

September 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP2989-CR

Cir. Ct. No. 2004CF307

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN D. STARLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Jordan D. Starling appeals from a judgment convicting him of possession of GHB, ketamine, flunitrazepam in violation of

WIS. STAT. § 961.41(3g)(f) (2003-04).[1] Starling argues that the circuit court erred in denying his motion to suppress evidence resulting from the arresting officer's warrantless search of his person. Starling contends that the search violated his Fourth Amendment rights because the officer did not have probable cause to arrest him for the drug-related offense prior to the search. We agree and reverse and remand for proceedings consistent with this opinion.

FACTS

¶2 On July 1, 2004, the State charged Starling with possession of narcotic drugs and possession of drug paraphernalia. The charges stemmed from a search and arrest of Starling occurring at a June 25 Phish concert at Alpine Valley. Starling ultimately filed a motion to suppress the evidence resulting from the search. Two officers involved in Starling's arrest testified at the February 2, 2005 suppression hearing.

¶3 Sodara Orn, an investigator with the Wisconsin Department of Justice, Division of Criminal Investigation, Narcotics Bureau, testified that he was at Alpine Valley on June 25, 2004, to assist the Walworth County Sheriff's Department with overseeing the grounds and ensuring that no illegal drug activity took place. Orn stated that Walworth County Sheriff's Deputy Gilbert Maas, among others, was on patrol with him. Orn indicated that he spotted four individuals sitting in a vehicle in one of the parking lots. Based on the vehicle's location, Orn believed that it had been there for quite awhile.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 According to Orn, Maas approached the driver's side window and he approached the right rear passenger door. Orn testified that he saw smoke coming out of the vehicle and that the right rear passenger window was open. Orn could not recall saying anything to Maas before he approached the vehicle. When he approached the vehicle, Orn made eye contact with Starling and showed him his badge. Orn observed that Starling, who was seated in the rear passenger's side of the vehicle, had a balled-up Kleenex in his left hand and a cigarette in his right hand. When Orn asked Starling what was in the Kleenex, Starling informed him that it was candy and attempted to conceal the Kleenex between his legs under the seat. Orn then asked Starling to show him the contents of the Kleenex, but Starling indicated that it was nothing and continued to try to conceal the Kleenex underneath the seat between his legs. In response, Orn reached in the car and took the Kleenex from Starling's hands. Orn testified that while he was not positive that the Kleenex contained drugs, he had "a good hunch." Orn stated that based on his five years of training and experience, "there had been many occasions where drug dealers have concealed their controlled substances inside balled-up Kleenexes." Several plastic baggies containing a powdery white substance, which was later shown to be ketamine, fell out of the napkins and onto the floor of the vehicle.

¶5 Maas testified that on June 25, a sunny day with temperatures in the mid-seventies and eighties, he was working undercover for the Walworth County Drug Enforcement unit at Alpine Valley. Maas testified that he had worked close to one hundred concerts. Maas testified that when he is patrolling the parking lot at such a concert he is on the lookout "for the people … that stand out, make themselves obvious" such as by sitting in a parked car on a fairly warm day with the doors shut. Maas testified that it is uncommon for concert goers not involved

in drug activity to remain in their vehicles in the parking lot as they are often outside tailgating.

¶6 On June 25, Maas approached the driver's side of the vehicle in which Starling was sitting. Maas stated that he could not recall if the vehicle was running at the time or if the passenger side windows were rolled down. He testified:

> As I approached the driver's side, the doors were shut, there [were] four subjects in the vehicle, and I could see that the person sitting in the driver's seat was leaned back and appeared to be looking in the direction of Mr. Starling.
>
> And as I approached the vehicle more, I could see that all three other occupants were focused on what Mr. Starling was doing. And with that … Orn approached the passenger side of the vehicle.

Maas testified that the fact that the occupants all looked anxious while they turned and looked at Starling aroused his suspicions.

¶7 Maas testified that he could not see what was taking place in the back seat, but that Orn advised him that he could see "something in Mr. Starling's hands." Maas testified that he could not remember Orn's exact words, but he thought that Orn stated that he could see in "plain view that Mr. Starling had some plastic baggies or bindles in his hand." Maas indicated that up until this time he had not seen any marijuana, smelled any marijuana or seen any other signs of drug activity. At this time, the officers made contact with Starling and ultimately arrested him.

¶8 The court denied Starling's motion to suppress. In reaching this decision, the court made the following findings of fact. In the officers' experience, drug activity commonly occurs in the parking lots of concerts and that

most people get out of the cars right away when they arrive at the concerts. If the occupants remain in the vehicle after parking, it very frequently is an indication of drug activity. In this case, the vehicle had been parked for awhile. It was a sunny and warm day, somewhere between seventy and eighty degrees. The officers saw smoke coming from the vehicle, but the court did not know whether it was cigarette or marijuana smoke. The officers were not sure if the passenger windows were closed or open and if the car was running or off. The officers saw that the vehicle's occupants were anxious and turned toward Starling. Maas could see that something was taking place in the back seat, and Orn testified that he informed the other officers that Starling had a balled-up Kleenex in his hand. Orn then asked Starling what was in the Kleenex. Starling replied, "candy," and attempted to conceal the Kleenex under the seat, which the court characterized as a furtive gesture. Orn asked Starling what was in the Kleenex several times, but each time Starling replied, "Nothing." Orn then reached into the car and took the Kleenex. Several baggies of powder fell to the floor from the Kleenex. Based on his training and experience, Orn believed that Starling was concealing illegal drugs in the Kleenex at the time he seized it. Relying on ***State v. Grandberry***, 156 Wis. 2d 218, 456 N.W.2d 615 (Ct. App. 1990), and ***United States v. Barrett***, 890 F.2d 855 (6th Cir. 1989), *superseded on other grounds*, the court determined that these facts established the probable cause necessary to conduct the search.

¶9 Starling pled guilty to possession of GHB, ketamine, flunitrazepam, contrary to WIS. STAT. § 961.41(3g)(f). Starling appeals.[2]

STANDARD OF REVIEW

¶10 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the circuit court's decision. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

DISCUSSION

¶11 Starling contends that Orn's warrantless search of the Kleenex he was holding in his hands violated his Fourth Amendment rights. Starling asserts that the search cannot be justified as a search incident to arrest because Orn did not possess probable cause to arrest him prior to the search. Starling maintains that the facts available to Orn at the time of the search—that he was seated in a parked car in the Alpine Valley lot on a warm sunny day with a balled-up Kleenex in his hands—do not sufficiently establish that he was engaged in illegal drug activity.

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[2] Jordan D. Starling died on February 3, 2006, one day after his principal brief and appendix were filed. In ***State v. McDonald***, 144 Wis. 2d 531, 539, 424 N.W.2d 411 (1988), our supreme court held, "[i]n summary, we hold that, when a defendant dies while pursuing postconviction relief, irrespective of the cause of death, that the defendant's right to an appeal continues."

¶12 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution provide protection from unreasonable searches and seizures. ***State v. Sykes***, 2005 WI 48, ¶13, 279 Wis. 2d 742, 695 N.W.2d 277. Historically, Wisconsin has followed the United States Supreme Court's interpretations when construing both constitutions' search and seizure provisions. ***Id.***

¶13 A warrantless search of a person incident to a lawful arrest does not violate constitutional search and seizure provisions. ***Id.***, ¶14. "'A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.'" ***Id.*** (citations omitted).

¶14 A search incident to arrest must be contemporaneous to the arrest; however, where a formal arrest follows quickly on the heels of the challenged search, it is not particularly important that the search preceded the arrest rather than vice versa. ***Id.***, ¶15. Therefore, a search may be incident to a *subsequent* arrest if the officers have probable cause to arrest before the search. ***Id.***

¶15 Furthermore, probable cause to arrest must have existed independent of the fruits of the search of the suspect's person. ***Id.***, ¶16. In other words, a search may immediately precede a formal arrest so long as the fruits of the search are not necessary to support the arrest. ***Id.*** Accordingly, when a suspect is arrested subsequent to a search, the legality of the search is established by the officer's possession, before the search, of facts sufficient to establish probable cause to arrest followed by a contemporaneous arrest. ***Id.***

¶16 Probable cause to arrest exists "'when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead

a reasonable police officer to believe that the defendant probably committed a crime.'" ***Id.***, ¶18 (citations omitted). Although the evidence comprising probable cause must amount to more than mere suspicion, ***State v. Ritchie***, 2000 WI App 136, ¶8, 237 Wis. 2d 664, 614 N.W.2d 837, "[t]he objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility," ***Sykes***, 279 Wis. 2d 742, ¶18 (citations omitted). In determining whether probable cause exists, the trial court may consider the officer's previous experience, ***State v. DeSmidt***, 155 Wis. 2d 119, 134-35, 454 N.W.2d 780 (1990), and also the inferences that the officer draws from that experience and the surrounding circumstances, ***State v. Pozo***, 198 Wis. 2d 705, 712-13, 544 N.W.2d 228 (Ct. App. 1995).

¶17 In the present case, the officers did not have probable cause to arrest Starling for possession of an illegal substance before initiating the search. The trial court relied on several factors in finding probable cause to arrest. First, it was the experience of the officers that drug use is common in the parking lot of Alpine Valley prior to concerts. In particular, it was the officers' experience that illegal drug activity is often taking place where the concertgoers are seated in their vehicles with the doors closed on warm and sunny days. The vehicle Starling was seated in was parked there for some time, and it was a warm and sunny day. Second, in the officers' experience, Kleenex is commonly used to conceal drugs. Orn noticed a Kleenex in Starling's hands as he approached the vehicle. Third, as Orn approached the vehicle, Starling made a furtive gesture with the Kleenex. Taken together, these circumstances do not add up to probable cause.

¶18 While the officers' training and experience are probative under some circumstances, they are of little assistance to the State's case here. The fact that

Starling and the three other men were sitting anxiously in a parked vehicle on a warm day is much less suspicious given that Starling's window must have been rolled down and the trial court failed to make a finding as to the status of the air conditioner. There was no testimony that any officer smelled marijuana smoke, only that Starling was smoking a cigarette. Furthermore, the officers had no specific knowledge that Starling was engaged in any drug activity. Starling's mere presence at Alpine Valley prior to a scheduled concert hardly seems suspicious at all and adds very little to the State's case.

¶19 Although the fact that Starling held a balled-up Kleenex in his hands arguably contributes to a finding of probable cause, under the circumstances it does not add significantly to any existing suspicion that the officers had. Even if Kleenex is often used to conceal narcotics as Orn testified was his experience, the legitimate uses of Kleenex are so vast and common that we cannot accept that possession of a balled-up Kleenex provides enough to conclude that Starling was committing a narcotics offense. *See* ***United States v. Ingrao***, 897 F.2d 860, 864 (7th Cir. 1990) ("The added fact that Ingrao was carrying a bag, while arguably contributing to probable cause, does not add significantly to any already existing suspicion by the police."); *see also* ***United States v. Ceballos***, 654 F.2d 177, 185 (2d Cir. 1981) (The carrying of a paper bag alone does not provide enough to conclude a narcotics offense is being committed.). Indeed, Orn described his suspicion that the Kleenex contained drugs as a "good hunch."

¶20 Furthermore, we are not persuaded by the State's argument that the suspicions aroused by Starling's furtive gesture with the Kleenex gave rise to probable cause to arrest. This furtive gesture, without more specific evidence of Starling's involvement in illegal drug activity, is insufficient to raise mere suspicion of Starling to the level of probable cause. *See* ***Ingrao***, 897 F.2d at 864

("Furtive gestures … are more meaningful when coupled with other specific knowledge.").

¶21 In finding probable cause, the trial court analogized the facts of this case to ***Grandberry*** which relies on ***Barrett***.[3] However, both cases are easily distinguishable from our present case because the officers in both cases had specific evidence or knowledge of the involvement of narcotics, whereas in our present case they had none. *See* ***Grandberry***, 156 Wis. 2d at 220, 224-26 (finding probable cause where the officer was given a tip that the defendant would be leaving a specific area with a large amount of cocaine in his or her car); ***Barrett***, 890 F.2d at 857-61 (finding probable cause where the officers had just searched a trailer of a suspected drug dealer whom the officers had strong reason to believe had recently received cocaine and the defendant, holding a pouch, arrived and asked for the suspected drug dealer by name).

CONCLUSION

¶22 The officers in this case obviously had some grounds for suspicion. These circumstances may or may not have provided sufficient grounds for a valid ***Terry***[4] stop. Regardless, they are not sufficient to support probable cause for an arrest. Starling appears to have been arrested principally because he held a balled-up Kleenex in his hands in a vehicle parked in the lot of a concert venue and tried to conceal it. Without more specific evidence of illegal drug activity, we cannot

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[3] ***State v. Grandberry***, 156 Wis. 2d 218, 456 N.W.2d 615 (Ct. App. 1990), and ***United States v. Barrett***, 890 F.2d 855 (6th Cir. 1989), *superseded on other grounds*, concern a finding of probable cause to search a vehicle, but the lower court used these cases for the purposes of determining probable cause for an arrest.

[4] ***Terry v. Ohio***, 392 U.S. 1 (1968).

conclude that the officers possessed probable cause to arrest prior to the search. We therefore reverse and remand for proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

¶23 NETTESHEIM, J. (*dissenting*). Probable cause is not a technical, legalistic concept but a flexible, commonsense measure of the plausibility of particular conclusions about human behavior. ***State v. Petrone***, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991). I fear my colleagues in the majority have overlooked this fundamental precept of Fourth Amendment law.

¶24 The essential facts of this case are undisputed. Agent Orn, an investigator with the Narcotics Bureau of the Wisconsin Department of Justice, Division of Criminal Investigation, was assisting the Walworth County Sheriff's Department in overseeing the grounds at Alpine Valley at a Phish concert on June 24, 2004, in an effort to ensure that no illegal drug activity took place. Deputy Maas of the sheriff's department was similarly engaged in an undercover capacity. Both officers were aware that drug usage and drug dealing occur with some regularity in vehicles before certain concerts at Alpine Valley.

¶25 According to Maas, most people exit their cars and tailgate before a concert. Orn's attention was drawn to a vehicle because it was parked in a location suggesting that it had been there for some time and there were four occupants inside the vehicle on a warm day. As Orn and Maas approached the vehicle, they observed the occupants in the front seat turned towards the occupants in the rear seat. Orn approached on the rear passenger side of the vehicle and saw a person, later identified as Starling, holding a balled-up Kleenex in his left hand. When Orn asked Starling what was in the Kleenex, Starling responded, "Candy." At the same time, Starling attempted to conceal the balled-up Kleenex between his legs under the seat. Orn knew that drug dealers sometimes conceal controlled

substances in Kleenexes. Orn again asked what was in the Kleenex and this time Starling responded, “Nothing,” while continuing to try to conceal the Kleenex under the seat. At this point, Orn reached into the vehicle and extracted the Kleenex, which proved to contain the controlled substance.

¶26 Like the trial court, I find this to be a close case. But, also like the trial court, I conclude that the progression of events and the totality of the circumstances confronting the officers constituted probable cause justifying Orn’s seizure of the suspect Kleenex.

¶27 As the majority correctly states, mere suspicion is insufficient to constitute probable cause, but “[t]he objective facts … need only lead to the conclusion that guilt is more than a possibility.” ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277. Here, the officers were aware that drug use and drug dealing regularly occur before certain concerts on the grounds of Alpine Valley, and the officers were on patrol to monitor that very kind of potential activity. The officers also knew from their experience that this drug usage and dealing usually occurs within the confines of a vehicle. The location of the Starling vehicle indicated that it had been there for some time, but the occupants were nonetheless inside the vehicle on a warm day. This prompted the officers to approach the vehicle. Given the public nature of the venue, the officers were entitled to wander about as they saw fit, and I do not read Starling to argue otherwise.

¶28 While approaching the vehicle, the officers saw the occupants turned towards the rear seat as if interested or occupied with activity in that area of the vehicle. Approaching even closer, Orn saw Starling in the rear seat holding a balled-up Kleenex in his left hand. When twice asked about what was in the

Kleenex, Starling gave differing answers: "candy" and "nothing." Again, I do not read either the majority or Starling to contend that Orn's questions to Starling were improper. Orn had a right to engage Starling in a conversation and Starling had the right to not respond. But respond he did and, at the same time, also attempted to conceal the Kleenex between his legs under the seat.

¶29 In my judgment, Starling's differing and inconsistent answers to Orn's questions and his concurrent furtive gesture of attempting to conceal the balled-up Kleenex tips the scales in favor of probable cause. Prior to that, the officers had mere suspicion, but not probable cause, of possible criminal activity occurring within the vehicle. But Starling's subsequent conduct elevated the situation to something beyond mere suspicion. I submit that a reasonable police officer would logically conclude that criminal activity was likely afoot and that Starling was trying to conceal evidence relating to that activity. Probable cause exists when the totality of the circumstances would lead a *reasonable* officer to believe that the defendant probably committed a crime. ***Id.***

¶30 The majority faults the trial court's reliance on ***State v. Grandberry***, 156 Wis. 2d 218, 456 N.W.2d 615 (Ct. App. 1990), and ***U.S. v. Barrett***, 890 F.2d 855 (6th Cir. 1989), *superseded on other grounds*, because in those cases the officers had advance notice that the suspect might be involved in illegal drug activity. I appreciate the factual distinction, but I know of no case (and the majority and Starling cite to none) holding that such advance knowledge is a prerequisite to probable cause. If that is the law, many happenstance criminal events witnessed by police officers would preclude a search or arrest for lack of probable cause. That surely cannot be the law.

¶31 Moreover, here the officers had prior notice and knowledge of likely drug usage and drug dealing at Alpine Valley, and they were on site to monitor for that very kind of activity. The fact that an area is known for criminal activity can contribute to reasonable suspicion. *See* ***State v. Amos***, 220 Wis. 2d 793, 800, 584 N.W.2d 170 (Ct. App. 1998).

¶32 As noted, this was an escalating situation. Viewed in isolation, none of the individual facts would constitute probable cause; nor would the cumulative facts prior to Orn's direct contact with Starling. But after receiving Starling's differing and inconsistent answers, coupled with Starling's highly suspect furtive attempts to conceal the Kleenex, I conclude that Orn had probable cause to retrieve the suspect item. The majority's analysis of the facts is overly technical and legalistic. As a result, the majority's analysis overlooks a "commonsense measure of the plausibility" of the particular facts confronting the officers. ***Petrone***, 161 Wis. 2d at 547-48. I respectfully dissent.