COURT OF APPEALS DECISION DATED AND FILED

May 24, 2007

David R. Schanker
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. 2006AP2598-CR

Cir. Ct. No. 2006CM156

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

PHILLIP CORY JACKSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] The State appeals from an order granting Phillip Jackson's motion to suppress evidence obtained subsequent to his detention by

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

police officers. The State relies on two factors that it contends show that a reasonable police officer would have had an articulable suspicion to extend Jackson's detention and await a drug-detention dog: Jackson's drug history and a possible odor of burnt marijuana amongst three other distinct odors. Because we conclude that these two factors do not give rise to a reasonable, articulable suspicion that criminal activity is afoot, we affirm the order granting the motion to suppress.

Background

¶2 On April 14, 2006, Platteville Police Officers Pucek and Kretschman stopped Jackson for having an excessively loud and inadequate muffler. Before approaching Jackson's vehicle, Kretschman and Pucek discussed requesting a drug-detection dog. The officers then approached the vehicle and questioned Jackson about his muffler. Upon returning to the squad car, both officers turned off the microphones that had been recording the stop and had an unrecorded discussion outside of the squad car. Officer Kretschman testified that at this time, he stated to Officer Pucek that he believed that Jackson's car had an odor of burnt marijuana emanating from it.

¶3 Shortly after this discussion, Officer Kretschman requested a drug-detection dog from the Grant County Sheriff's Department. When making his request, Officer Kretschman stated that there was a strong cover odor in Jackson's car and that he believed Jackson had been known to transport drugs in the past. He was told that they would have to wait approximately twenty-five minutes for the drug-detection dog.

¶4 Officer Kretschman testified that after requesting the drug-detection dog, he and Officer Pucek extended the stop beyond the time needed to write a

warning ticket. During this time, they confirmed with dispatch that Jackson had previously been arrested for possession of drug paraphernalia. The officers also administered a preliminary breathalyzer test that registered no trace of alcohol.

¶5 After about twenty-four minutes, the drug-detection dog arrived and indicated the presence of a controlled substance in the car. Officer Kretschman searched Jackson and found a baggy containing approximately 3.4 grams of marijuana and a pipe. In both police reports written about a week to two weeks later, the officers stated that they requested a drug-detection dog because they initially smelled a strong cover odor in the car along with a possible smell of marijuana.

¶6 Jackson moved to suppress the evidence, claiming that the stop was longer than necessary to write out a warning and that the officers did not have a reasonable, articulable suspicion to extend Jackson's stop. During the suppression hearing, Officer Kretschman testified that he had smelled a strong fragrant smell of cologne or air freshener and a distinct odor of marijuana in Jackson's car. Kretschman also testified that he had experienced an allergic reaction that he typically experiences when smelling marijuana. However, neither the indication of a distinct odor of marijuana nor the indication of an allergic reaction appeared in the police report. The police reports also failed to indicate that Jackson was smoking a menthol cigarette at the time of the stop.

¶7 The circuit court granted Jackson's motion to suppress the evidence because it found that it was gathered subsequent to an unreasonable detention. The court concluded that the officers did not have a reasonable, articulable suspicion to extend Jackson's stop. It found that Jackson's history and the mere possibility of an odor of marijuana lingering under the odors of an air freshener,

cologne and a menthol cigarette were insufficient to constitute reasonable suspicion. The court said: "It's good police work and it's a good hunch, but it's not reasonable suspicion."

Analysis

¶8 In reviewing a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Harris***, 206 Wis. 2d 243, 249-50, 557 N.W.2d 245 (1996). The circuit court, when acting as the fact finder, is the ultimate arbiter of the credibility of a witness, and its finding in that respect will not be questioned where more than one reasonable inference can be drawn from credible evidence. ***Dejmal v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶9 Whether the circuit court's findings of fact give rise to a reasonable suspicion is a question of law, and we are not bound by the lower court's decision on that issue. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). The Fourth Amendment of the United States Constitution protects the right of individuals against unreasonable searches and seizures. U.S. CONST. amend. IV. Wisconsin courts "'consistently follow[] the United States Supreme Court's interpretation of the search and seizure provision of the fourth amendment in construing the same provision of the state constitution.'" ***State v. Kiper***, 193 Wis. 2d 69, 80, 532 N.W.2d 698 (1995) (quoting ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990)). We judge police officers' actions against a standard of reasonableness, which "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" ***State v. Malone***, 2004 WI 108, ¶21, 274 Wis. 2d 540, 638 N.W.2d 1 (quoting ***Pennsylvania v. Mimms***, 434 U.S. 106, 109 (1977)).

¶10 In ***Illinois v. Caballes***, 543 U.S. 405, 407 (2005), the United States Supreme Court stated that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." However, if during a valid seizure an officer becomes aware of additional suspicious factors that give rise to a reasonable, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter. ***Malone***, 2004 WI 108, ¶24. At this point, the officer may prolong the seizure to conduct a separate, independent investigation. *See* ***id.***

¶11 The issue therefore is whether there were articulable facts which would warrant a reasonable police officer to suspect that criminal activity was afoot. *See* ***Waldner***, 206 Wis. 2d at 55-56. When determining whether reasonable suspicion exists, we consider the totality of the circumstances. ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. This inquiry must necessarily take into account both the quantity and the quality of the suspicious factors. ***Id.***

¶12 ***Waldner***, 206 Wis. 2d at 56-69, considered whether a police officer had sufficient articulable factors to detain an individual for questioning. There, the court addressed several facts—the time of night, the speed of the car, the erratic driving pattern, the driver pouring out liquid from a cup, and the driver's evasiveness. ***Id.*** at 60-61. The court concluded that these facts "coalesce to add up to a reasonable suspicion." ***Id.***

¶13 Here, we have two factors that the circuit court found to be present: Jackson's drug history and a possible odor of burnt marijuana amid three other distinct odors. When requesting a drug-detection dog, Officer Kretschman did not

mention any odor of burnt marijuana but instead stated that there was a cover odor in Jackson's car and that he believed Jackson had been known to transport drugs in the past. It was not until a week to two weeks later that the officers documented having possibly smelled marijuana. This is a sparse record.

¶14 Similarly, the quality of the two factors in question seems suspect. First, Officer Kretschman's belief that Jackson may be a known drug transporter was never corroborated before requesting the drug-detection dog. Only after the request did the officers confirm Jackson's arrest record. Second, despite Officer Kretschman's testimony that he smelled a distinct odor of burnt marijuana that triggered an allergic reaction, the circuit court found that the odor of marijuana was merely a possibility amid three other distinct odors—air freshener, cologne and menthol cigarette smoke.[2] We further note that there is no other evidence in the record indicating that the odor was anything more than a possibility. As the circuit court stated, these two factors add up to no more than a hunch. However, an inchoate suspicion or hunch does not suffice. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). Allowing a police officer to detain an individual based on a hunch invites "arbitrary invasion[s] at the unfettered discretion of [police] officers ...." *See* ***Waldner***, 206 Wis. 2d at 57.

[2] The circuit court implicitly accepted Kretschman's police report as credible rather than his testimony, and we therefore defer to that finding. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (stating that we will accept the circuit court's implicit findings on witness credibility).

¶15 Citing ***State v. Secrist,*** 224 Wis. 2d 201, 589 N.W.2d 387 (1999),[3] the State contends that if an unmistakable odor of marijuana gives rise to probable cause to search, then a possible odor of marijuana alone surely gives rise to a reasonable, articulable suspicion to extend a detention. This mechanical interpretation of the Fourth Amendment does not consider that although "[t]here are broad principles of search and seizure, ... each case must be evaluated on its own facts." ***Malone***, 2004 WI 108, ¶22. The point at which a possible observation develops from an inchoate thought into a reasonably certain, articulable fact is necessarily a moving target, but it is nonetheless a factual determination that is made by the circuit court.[4] After evaluating the record and the officers' testimony, the circuit court characterized the possibility of an odor of burnt marijuana as merely a hunch. This characterization implies that the court gave little weight to the officers' undeveloped assertion that they possibly smelled burnt marijuana amongst three other distinct odors. We therefore defer to the circuit court's credibility judgment that the factual underpinning for the possibility that an odor might be that of burnt marijuana was too imprecise to be more than a hunch.

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[3] ***State v. Secrist***, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999), holds that "[t]he unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime."

[4] In other areas of Wisconsin law, circuit courts are similarly charged with determining the point at which a possibility becomes a reasonably certain fact. *See*, *e.g*, ***McGarrity v. Welch Plumbing Co.***, 104 Wis. 2d 414, 430, 312 N.W.2d 37 (1981) (discussing required certainty of expert witness findings); ***Plywood Oshkosh, Inc. v. Van's Realty & Constr., Inc.***, 80 Wis. 2d 26, 31-33, 257 N.W.2d 847 (1977) (discussing reasonable certainty of proof of damages); ***Buxbaum v. G.H.P. Cigar Co.***, 188 Wis. 389, 392-93, 206 N.W. 59 (1925) (discussing reasonable certainty of proof of loss of future profit).

¶16 Based on the circuit court's findings of fact and credibility determinations and our review of the record, we agree with the circuit court's conclusion that the officers did not have a reasonable, articulable suspicion to extend Jackson's detention. We therefore affirm the circuit court's order granting Phillip Jackson's motion to suppress evidence obtained subsequent to an unreasonable detention.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4. (2005-06).