COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1227-CR **Cir. Ct. No. 2005CF1601**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARYL HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Daryl Howard appeals a circuit court judgment convicting him of carrying a concealed weapon after a state patrol officer found a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

law enforcement baton in Howard's vehicle during a traffic stop. The officer discovered the baton in the course of a protective search of Howard's person and vehicle. Howard argues that evidence seized from his vehicle should have been suppressed because the officer lacked reasonable suspicion to justify the protective searches. We disagree, and affirm the circuit court's judgment.

Background

¶2 The facts are not in dispute and, except as otherwise indicated, derive from the officer's suppression hearing testimony. At approximately 8:50 a.m. on July 17, 2005, the officer was running radar in a median crossover on I-39 and clocked a vehicle traveling at 97 or 98 miles per hour in a 65-mile-per-hour speed zone. The officer activated his lights and siren, and the vehicle pulled over "[f]airly quickly," in a "reasonable time." Howard was the driver and sole occupant of the vehicle.

¶3 After stopping the vehicle, the officer observed Howard making "a lot of furtive movement" toward the center console area of the front seat. The officer approached Howard's vehicle, asked Howard for his driver's license, and asked Howard to get out of the vehicle. Howard responded that he "wasn't going to get out of the vehicle" and that "he had rights and he knew his rights" or something along those lines. The officer again asked Howard to exit the vehicle, and Howard responded by asking for the officer's sergeant. The officer testified that this was not a normal occurrence during a stop.

¶4 Howard and the officer "went back and forth," and the officer told Howard that he wanted Howard out of the vehicle because of Howard's

movements to the center console area. Howard asserted to the officer that he had been reaching for his insurance card.[2] At some point while still in the vehicle, Howard also indicated that he was a "reserve officer" or had been a reserve officer at one time. Eventually, Howard exited the vehicle.

¶5 The officer placed Howard in handcuffs, telling Howard it was "for his safety and my safety." After patting down Howard, the officer placed him in the rear of the officer's patrol car. The officer returned to Howard's vehicle and checked the front seat area where the officer had seen Howard making the furtive movements. As the officer was looking in the console area, he noticed "a lot of law enforcement type items" on the floorboard behind the driver's seat. The items included a law enforcement baton in a leather sheath, handcuffs and a handcuff holder, what looked like oleoresin capsicum spray in a leather sheath, and an empty "pancake style" holster for a weapon.

¶6 The officer contacted district headquarters. He discovered that Howard was a felon after calling in Howard's license and registration and requesting a criminal records check. After consulting with his sergeant, the officer searched Howard's trunk and found body armor and a Cook County law enforcement or corrections jacket.

¶7 The State charged Howard with felon in possession of body armor, in violation of WIS. STAT. § 941.291(2)(b), and carrying a concealed weapon, in

[2] Although the officer's testimony is not entirely clear on this point, it appears that the officer understood at the time that Howard was from Illinois and that drivers in Illinois are required to show proof of insurance when stopped.

violation of WIS. STAT. § 941.23. After the circuit court denied his motion to suppress, Howard agreed to plead no contest to the concealed weapon charge.[3]

Discussion

¶8 During a traffic stop, an officer is authorized to conduct a protective search of a person's outer clothing to determine whether the person is armed if the officer reasonably believes that the officer's safety or the safety of others is in danger. ***State v. Johnson***, 2007 WI 32, ¶21, ___ Wis. 2d ___, 729 N.W.2d 182. Similarly, an officer may conduct a protective search of the passenger compartment of a vehicle during a traffic stop if the officer reasonably believes that the suspect is dangerous and may gain immediate control of weapons that are placed or hidden in the passenger compartment. ***Id.***, ¶24 (citing ***Michigan v. Long***, 463 U.S. 1032, 1049 (1983)). Whether undisputed facts satisfy the constitutional requirement for performing a protective search is a question of law that we review *de novo*. *See* ***State v. Kyles***, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449.

¶9 Howard argues that his case cannot be meaningfully differentiated from ***Johnson***, in which the supreme court concluded that police lacked justification to perform a protective search of a suspect's person and vehicle during a traffic stop. *See* ***Johnson***, 2007 WI 32, ¶¶1, 36, 48.[4]

[3] The State agreed to dismiss the body armor charge.

[4] We previously stayed Howard's appeal pending the supreme court's decision in ***State v. Johnson***, 2007 WI 32, ___ Wis. 2d ___, 729 N.W.2d 182.

¶10 ***Johnson*** involved the following pertinent circumstances: the suspect (Johnson) had committed a traffic violation for failing to signal; police saw Johnson make a "strong furtive movement bending down as if he was reaching … underneath the seat" with his "head and shoulders disappear[ing] from view"; the officers testified that, in light of their experience and training, they believed the movement was consistent with an attempt to conceal contraband or weapons; the stop occurred "[l]ate in the afternoon" when it was "dark, but the area was illuminated by street lamps"; and, when police asked Johnson to step out of the vehicle, Johnson said he had a bad leg but complied. ***Id.***, ¶¶2-3, 5, 40.

¶11 The court in ***Johnson*** concluded that the furtive movement described was not, by itself, sufficient to justify the protective search of Johnson's person and vehicle. ***Id.***, ¶43. The court recognized, however, that, depending on the totality of the circumstances, such movement could be a "substantial factor" in establishing reasonable suspicion that the suspect was dangerous and had access to a weapon. ***Id.***, ¶37.

¶12 Howard asserts that, as in ***Johnson***, his furtive movement was insufficient to justify a protective search. Howard further asserts that, as in ***Johnson***, the officer here possessed no suspicion of criminal activity, the stop did not occur at a late hour or in an isolated location, and the stop did not involve circumstances that put the officer in a particularly vulnerable position.

¶13 We conclude, however, that there are at least two facts that differentiate Howard's case from ***Johnson***. First, Howard's extreme speeding is qualitatively different than the more routine traffic violation in ***Johnson***. Second, Howard acted suspiciously when the officer made contact with him. Howard initially refused the officer's lawful request that Howard exit his vehicle, and did

so even when the officer explained to Howard that the officer was making the request because of Howard's movements toward the center console. Howard now concedes that the officer had the authority to require him to exit his vehicle under ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977).[5]

¶14 An officer could reasonably believe that a driver who had just been hurtling along at nearly 100 miles per hour and who repeatedly refuses to cooperate with a lawful request to exit his vehicle is more likely than the average citizen to engage in an impulsive or aggressive act against the officer. *Cf.* ***State v. McGill***, 2000 WI 38, ¶31, 234 Wis. 2d 560, 609 N.W.2d 795 (officer may reasonably infer that a person "under the influence" may be more likely than a sober one to commit an impulsive or violent act against a police officer). In addition, we agree with the State that another relevant fact is that Howard informed the officer that he was or had previously been a "reserve officer." The officer could have reasonably inferred that Howard's status as a current or former "reserve officer" made it more likely that Howard may have possessed some sort of weapon.

[5] It could be argued that the suspect in ***Johnson*** acted suspiciously because, as an officer reached toward Johnson's left leg during the protective search of Johnson's person, the suspect "fell to the ground," "acted like he fell down," or "attempted to [fall down]." ***Johnson***, 2007 WI 32, ¶6. The court in ***Johnson*** did not, however, consider Johnson's falling-down behavior in analyzing the reasonableness of the protective search of Johnson's person or vehicle. The behavior was not relevant to the reasonableness of the protective search of Johnson's person, of course, because it was not a fact known to police at the time they commenced the search. The behavior was not relevant to the protective search of Johnson's vehicle, according to the ***Johnson*** court, because it was the product of the illegal protective search of Johnson's person. ***Id.***, ¶47. Because the ***Johnson*** court had no occasion to consider this arguably suspicious behavior by Johnson as part of its totality-of-the-circumstances analysis, Howard's suspicious behavior is a fact that differentiates Howard's case from ***Johnson***.

¶15 We acknowledge that Howard provided the officer with an innocent explanation for his movement toward the center console of his vehicle, namely, that he was searching for his insurance card. *See* ***Johnson***, 2007 WI 32, ¶40 n.15 (suspect's answer to police question about such a movement, and demeanor while answering, could provide information that is relevant to whether a protective search is reasonable). We determine, however, that, despite this explanation, it remained equally reasonable under the totality of the circumstances for the officer to infer that Howard had instead been reaching for or secreting a weapon.

¶16 In sum, when we consider Howard's furtive movement in combination with his extreme speeding, his suspicious behavior, and all the other circumstances of this case, we are satisfied that a reasonable officer could have suspected that Howard may have had access to a weapon and posed a danger to the officer, thereby justifying the officer's protective searches.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.