COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1655-CR **Cir. Ct. No. 2005CF69**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN P. ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Norman P. Roberts appeals from a judgment of conviction and an order denying his motion for postconviction relief. Roberts argues on appeal that the circuit court erred when it denied his postconviction

motion to suppress evidence. The basis for Roberts' motion was that the evidence was fruit of a stop that an Illinois court had previously found to be illegal.

¶2 Specifically, Roberts argues: that the State waived the issue of the validity of the initial stop and that waiver was legally binding on the circuit court, the circuit court switched the burden of proof on the constitutional validity of the stop from the State to the defendant, the circuit court prejudged the facts before the hearing on the motion, the circuit court's findings of fact were clearly erroneous, the police officer did not have a legally valid reason for the stop, the Illinois police officer admitted that the information on which he acted to stop Roberts was unreliable and hence his reason for the stop was invalidated, the search of Roberts' home was not sufficiently attenuated from the illegal stop, and the court should have suppressed the evidence. We conclude that the Wisconsin circuit court had the authority to independently decide the suppression issue, and that the court properly determined that the police officer had a reasonable suspicion to stop Roberts' car. We affirm the judgment and order.

¶3 On January 24, 2005, a police officer in Illinois stopped a car driven by Roberts. The police officer testified that he was on duty in a marked police car when he saw Roberts' car travelling towards him. The officer said that he looked at the license plate and memorized the number. He also saw that there was tint in the front window. The officer entered the car's license plate number into his on-board computer, and learned that the registration for the car was suspended. The officer made a u-turn to follow the car, and stopped it.

¶4 The parties stipulated to the following facts. In the car were also Roberts' son and Joseph Franklin. After approaching the car, the police officer noticed a strong odor of what he believed to be cannabis coming from the car. He

asked for and received permission from Roberts to search the car. The officer found marijuana, money, and rolling papers in the car and in Roberts' pockets. The police arrested and questioned all three of the occupants of the car. After being given his ***Miranda***[1] rights, Franklin told the police that he had marijuana in his bedroom in Kenosha, Wisconsin. The police searched and found marijuana in Franklin's home. The police continued to question Franklin and Franklin eventually told them that he had seen Roberts with a duffel bag containing at least a pound of cannabis at Roberts' home earlier that day. Based on this information, the police obtained a search warrant to search Roberts' home, where they seized a large-amount of marijuana and prescription drugs, as well as scales and other drug-related items. An Illinois court later determined that the police did not have probable cause or a reasonable suspicion to make the initial stop, and granted a motion to suppress the evidence.

¶5 Roberts moved the Kenosha county circuit court to suppress the evidence found at his home pursuant to the search warrant as fruits of the poisonous tree from the illegal Illinois stop. The trial court held hearings and ultimately denied the motion. Roberts pled guilty. Roberts then filed a postconviction motion alleging that the trial court applied the wrong legal standard when it denied his suppression motion. Prior to this motion, the State had conceded that the Wisconsin courts were bound by the Illinois' court's determination on the validity of the stop. In the briefing on the postconviction motion, however, the State argued that the stop was legal. The circuit court held a

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

hearing and heard the testimony of the Illinois officer. The circuit court agreed with the State that the stop was legal, and denied the motion.

> ¶6 Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. ***State v. Mitchell***, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992); ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review de novo. ***Id.***, ¶¶18-19.

State v. Popke, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569.

¶7 "Investigative stops are subject to the constitutional reasonableness requirement." ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The determination of reasonableness is a common sense test, based on the totality of the facts and circumstances. ***Id.***, ¶13. A traffic stop is generally reasonable if the officers have probable cause to believe a violation has occurred or reasonably suspect that a violation has been or will be committed. ***Popke***, 317 Wis. 2d 118, ¶11.

¶8 Roberts first argues that the State waived the issue of the validity of the initial stop by conceding that the Illinois court had found the stop was constitutionally invalid. Roberts argues that the State made a strategic decision to waive this issue, and that this waiver is binding on the State as well as the court. The cases on which Roberts relies to support his argument, however, both involve a strategic waiver of an objection to the admission of evidence. *See* ***Murray v. State***, 83 Wis. 2d 621, 628-29, 266 N.W.2d 288 (1978) and ***State v. McDonald***, 50 Wis. 2d 534, 537, 184 N.W.2d 886. Roberts, however, is arguing that the circuit court, and this court too, are bound by a ruling of law from another jurisdiction in a case in which the State was not a party, because the State did not raise the issue

early enough in the trial court in this proceeding. The issue presented is a question of law, and a question of law "cannot be bargained away by counsel nor shielded from *ab initio* consideration by successive court reviews." *See* ***Fletcher v. Eagle River Hosp.***, 156 Wis. 2d 165, 182, 456 N.W.2d 788 (1990). The circuit court was not bound by the Illinois court's determination on this question of law, and was entitled to review the issue of whether the stop was constitutionally valid.

¶9 Roberts argues that the circuit court impermissibly prejudged the question of whether the stop was constitutionally valid. In support of this argument, Roberts quotes a phrase from the court's decision: "I have concluded in the past, and confirm the conclusions now, that the Illinois stop was lawful, and that suppression of the evidence would be inconsistent with law, and constitute a miscarriage of justice." Roberts has taken this statement out of context to argue that the court prejudged the facts. When considered in the proper context, it is clear that the court was not saying that it had already decided the issue here, but rather that it had been faced with the question of whether it was bound by an Illinois determination in the past, and had concluded that it was not. We reject Roberts' argument that the court prejudged the facts.

¶10 Roberts argues that the court's findings of fact were clearly erroneous. The central issue in the suppression motion was whether the police officer checked Roberts' registration status before he stopped Roberts' car or afterwards. The circuit court found that the officer checked the records before he stopped Roberts. Roberts argues that this finding is clearly erroneous, the court applied the wrong burden of proof, and that the officer changed his Wisconsin testimony to overcome the deficiencies found by the Illinois court.

¶11 The circuit court found that the evidence established that prior to the stop the officer had a reasonable suspicion that Roberts' registration was suspended, and consequently, the officer had sufficient reason to stop the car. In support of this finding, the court relied on the officer's testimony and an affidavit in which Roberts stated that the officer said he had stopped Roberts for an "expired" registration. Roberts argues that this shows that the officer was not being truthful because the officer said "expired" and not "suspended." We are not convinced that the use of different words is enough to render the officer's testimony incredible and the court's finding clearly erroneous. Whichever word the officer used when he stopped Roberts, both the officer's testimony and Roberts' affidavit show that the police officer stopped Roberts because of a problem with Roberts' registration.[2] This finding was not clearly erroneous.

¶12 Roberts argues that the officer knew that information received from the Wisconsin Department of Transportation was not reliable, and therefore he could not have a reasonable suspicion based on information received from the DOT. Roberts, however, overstates the officer's testimony. The officer said that prior to that date he had heard that "there were some issues with the Wisconsin registrations." He later explained that based on his training, he believed on the date of the stop that the Wisconsin DOT information could be relied on to make traffic decisions. We reject Roberts' argument that the officer unreasonably relied on the DOT information to determine the status of his registration.

[2] Nor are we convinced by Roberts' argument that the officer "fudged" his testimony and that the discrepancies in the officer's testimony render all of it suspect.

¶13 Roberts argues that the officer's testimony that he stopped the car because the windows were tinted "was totally irrational" because the Illinois ban on cars with tinted windows applied only to cars with Illinois registrations. Because we conclude that the officer properly stopped the car for a suspended registration, we need not address this issue.

¶14 Roberts also argues that the court improperly placed the burden of proof on him rather than on the State. The circuit court stated: "The burden was on the People in Illinois; because in Wisconsin there was a search warrant, the burden is on the defendant." The issue presented to the court in this case was whether the stop in Illinois was reasonable, and the State bears the burden of proof in that case. *See* ***Post***, 301 Wis. 2d 1, ¶12. While Roberts is correct that the court addressed the issue of burden of proof in the wrong context, we nonetheless affirm. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on grounds different than those relied on by the trial court). The record shows that there was sufficient evidence to establish that the stop by the Illinois officer was reasonable, and that the State met its burden of proof. We are not convinced by Roberts' arguments that the circuit court's misstatement in its opinion about the burden of proof makes its findings of fact clearly erroneous.

¶15 We conclude that the circuit court's findings of fact were not clearly erroneous, and that these facts establish that the Illinois police officer had a reasonable suspicion to stop Roberts' car. Because we have concluded that the circuit court properly determined that the stop was constitutionally valid on these grounds, we need not address the other arguments Roberts raises. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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