COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2797-CR **Cir. Ct. No. 2009CF50**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROSALYN Y. HUMPHREY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. The State has appealed from an order suppressing evidence seized from a motor vehicle owned and operated by the defendant, Rosalyn Humphrey. A deputy sheriff seized marijuana from a duffle bag in the trunk of Humphrey's car after stopping her for speeding. Humphrey was charged

with possession of marijuana with intent to deliver as a repeat drug offender. Because we conclude that the evidence was seized pursuant to a valid consent search, we reverse the suppression order and remand the matter for further proceedings consistent with this decision.

¶2 Fond du Lac County Deputy Sheriff Steven Kastenschmidt, the officer who conducted the search of Humphrey's vehicle, was the only witness to testify at the suppression hearing. Kastenschmidt testified that on February 25, 2009, he was working a traffic enforcement detail on Highway 41 with another officer, Deputy Borgen. Kastenschmidt indicated that Borgen was operating "laser" on Highway 41 and County B, and that he was the "chase car" positioned by the overpass. Kastenschmidt testified that shortly before 4:00 p.m., Borgen radioed him that a vehicle going 77 miles per hour and which Borgen believed to be a Chrysler was just passing beneath the overpass. Kastenschmidt testified that he looked down and saw Humphrey's green Chrysler. He testified that this was the only Chrysler that came under the overpass at this time, and that he stopped the vehicle for speeding.

¶3 Kastenschmidt testified that when he stopped the vehicle, he told Humphrey that she had been stopped because the officer on the overpass "had her on laser at 77 miles per hour." Kastenschmidt testified that Humphrey commented that she was trying to keep up with the flow of traffic.

¶4 Kastenschmidt testified that he told Humphrey to remain seated while he checked her driver's license. He testified that he then ran a check of Humphrey's license and an abbreviated criminal history check. He testified that based upon the criminal history check, he called for assistance from another

officer. He testified that he completed a written warning for speeding while he waited for the other squad car to arrive.

¶5 Kastenschmidt testified that after the other officer arrived, he asked Humphrey to exit her vehicle and stand off to the shoulder between Humphrey's vehicle and Kastenschmidt's squad car so that he would not be standing in traffic while he explained the warning to her. He testified that he then gave the warning to Humphrey and explained it to her. He testified that after he finished explaining the warning, he told her "that she was free to go." He testified that he then made a slight turn towards his squad car to start heading back to it, and Humphrey started walking back to her car. Kastenschmidt testified that he then asked Humphrey if she would give him consent to search her vehicle.

¶6 Kastenschmidt testified that in response to his question, Humphrey asked him what he was looking for and he told her that he was looking for any type of illegal contraband that she was not supposed to have. He testified that she asked him to explain what he meant, and he told her "guns, bombs, knives, anything illegal that she wasn't suppose to have." Kastenschmidt testified that Humphrey then told him yes, that he could search her vehicle.

¶7 The record indicates that after searching the interior of the vehicle, Kastenschmidt opened the locked trunk. At the suppression hearing, Kastenschmidt testified that he took the keys from the ignition to open the trunk, and did not specifically request consent to search it.[1] Kastenschmidt indicated that

[1] At the suppression hearing, Humphrey's counsel asked Kastenschmidt whether Humphrey came up and asked him again about the search when he went to the trunk area. Kastenschmidt replied that she did. However, Kastenschmidt did not testify as to what Humphrey said at the time, and Humphrey never testified at the suppression hearing.

the trunk contained a duffle bag, and that Humphrey told him that it belonged to a friend of hers, but would not give him the friend's name. Kastenschmidt opened the duffle bag, which contained a duct-taped package. Kastenschmidt testified that Humphrey denied knowing what was in the package. He testified that he then "did ask her since it was not her duffle bag and the package was not hers, if she had any objections to me opening the packaging to see what was wrapped inside it, and she said no, that I could look inside it to see what was inside." Kastenschmidt testified that he tore open a corner of the package, discovered marijuana, and arrested Humphrey. Kastenschmidt testified that Humphrey was not in custody and was free to go during the search until the time he discovered the marijuana and arrested her.

¶8 The trial court suppressed the evidence seized by Kastenschmidt on the ground that the traffic stop ended when Kastenschmidt told Humphrey she was free to go. It concluded that Kastenschmidt was not entitled to ask Humphrey for consent to search the vehicle after the traffic stop ended.

¶9 On appeal, the State contends that the search was valid because Kastenschmidt lawfully stopped Humphrey for speeding and, after the traffic stop was concluded, was entitled to ask her to consent to a search of her car for contraband. The State contends that Humphrey was not seized when she consented to the search and that her voluntary consent extended to the search of the trunk, duffle bag, and wrapped package. We agree with the State's analysis of the evidence and relevant case law, and reverse the suppression order.

¶10 Initially, we address Humphrey's contention that Kastenschmidt's initial stop of her vehicle was illegal.[2] Nothing in the record supports this argument. An officer may conduct a traffic stop when he or she has probable cause to believe that a traffic violation has occurred or when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a traffic violation has been committed. ***State v. Popke***, 2009 WI 37, ¶13, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. In making a stop, an officer may rely on information received from another officer. ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). The question is whether the collective information among the officers is adequate to sustain the stop. ***Id.***

¶11 Whether undisputed facts establish reasonable suspicion justifying an investigative stop by police presents a question of constitutional fact subject to de novo review. *See* ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. As set forth above, Kastenschmidt testified that Borgen radioed him that a car he believed to be a Chrysler was going 77 miles per hour and was just passing beneath the overpass. Even though the officers may have lacked more detailed information as to the license number of the car or the precise kind of vehicle it was, based on Kastenschmidt's testimony that Humphrey's green Chrysler was the only Chrysler that came under the overpass at this time, Kastenschmidt was entitled to stop the car for speeding. Because Kastenschmidt had probable cause or, at minimum, reasonable suspicion to believe that

[2] Humphrey filed a motion to dismiss on the ground that the police lacked reasonable cause to stop her vehicle. At the suppression hearing, she contended that she was entitled to suppression of the evidence seized from her vehicle based on an illegal stop. The trial court did not address whether there was probable cause or reasonable suspicion to stop Humphrey's vehicle, apparently because it concluded that suppression was warranted on other grounds.

Humphrey had committed a traffic violation, no basis exists to conclude that the initial stop of Humphrey's vehicle was illegal.

¶12 The next issue is whether Humphrey validly consented to the search of her vehicle. Although warrantless searches are per se unreasonable under the Fourth Amendment, exceptions to the warrant requirement exist, including an exception for searches conducted pursuant to voluntarily given consent. ***State v. Luebeck***, 2006 WI App 87, ¶7, 292 Wis. 2d 748, 715 N.W.2d 639. Consent searches are standard, accepted investigative law enforcement devices and are not in any general sense constitutionally suspect. ***State v. Williams***, 2002 WI 94, ¶19, 255 Wis. 2d 1, 646 N.W.2d 834. However, a search authorized by consent is not valid if consent was given while the individual was illegally seized. ***Luebeck***, 292 Wis. 2d 748, ¶7.

¶13 When a Fourth Amendment suppression issue is raised, this court gives deference to the trial court's findings of evidentiary or historical fact, but determines questions of constitutional fact independently. ***Id.***, ¶8. Whether a defendant was seized within the meaning of the Fourth Amendment at the time he or she consented to a search is a question of constitutional fact that we review de novo. ***Id.***

¶14 The evidence that Humphrey consented to the search of her vehicle was undisputed. Based upon ***Williams***, we conclude that she was not seized when she gave her consent, and that the consent was valid.

¶15 Not every encounter with a law enforcement officer is a seizure within the meaning of the Fourth Amendment. ***Williams***, 255 Wis. 2d 1, ¶20. The general rule is that a seizure has occurred when an officer by means of physical force or show of authority has in some way restrained a citizen's liberty. ***Id.***

Questioning by an officer does not alone effectuate a seizure. ***Id.***, ¶22. The test to determine whether a person is seized is whether, considering the totality of the circumstances, a reasonable person would have believed that he or she was free to leave or otherwise terminate the encounter. ***Luebeck***, 292 Wis. 2d 748, ¶7. The test is an objective one, focusing not on whether the defendant felt free to leave, but whether a reasonable person, under all of the circumstances, would have felt free to leave.[3] ***Williams***, 255 Wis. 2d 1, ¶23.

¶16 In ***Williams***, an officer stopped the defendant for speeding. ***Id.***, ¶5. After asking the defendant to step out of the car, the officer issued a warning citation, obtained the defendant's signature on it, and returned the defendant's driver's license and vehicle rental papers to him. ***Id.***, ¶¶9-11. The officer then told the defendant: "Good, we'll let you get on your way then okay." ***Id.***, ¶11. The officer and the defendant then shook hands, exchanged parting pleasantries, and the officer turned around, taking a couple of steps toward his car. ***Id.***, ¶12. The officer then abruptly swiveled back around and in a louder but still conversational tone asked the defendant a rapid succession of questions about whether he had contraband or a large amount of money in the car. ***Id.*** Included in the questions, the officer asked the defendant whether he could search his car to be sure the mentioned items were not in it, and the defendant answered "yes," culminating in the discovery of a weapon and heroin. ***Id.***, ¶¶12-13. The encounter in ***Williams*** occurred at 2:30 a.m. on the shoulder of a rural section of the

[3] While it may be true that most people will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, does not, standing alone, eliminate the consensual nature of a response. ***State v. Williams***, 2002 WI 94, ¶23, 255 Wis. 2d 1, 646 N.W.2d 834.

interstate, but with "plenty of" traffic. ***Id.***, ¶34. A backup officer stood nearby on the passenger side of the defendant's vehicle. ***Id.***, ¶32.

¶17 The ***Williams*** court concluded that the totality of the circumstances established that a reasonable person would have felt free to decline the officer's questions and leave the scene or otherwise terminate the encounter. ***Id.***, ¶35. It stated that it was strongly influenced by the officer's statement that the defendant could "get on [his] way," concluding that the officer's words and actions, considered as a whole, communicated that the defendant had permission to leave because the traffic stop was over. ***Id.***, ¶29. The fact that the defendant stayed, answered questions, and gave consent to search did not establish that he was compelled to do so. ***Id.*** The court held that the defendant was free to leave when the officer returned his driver's license and paperwork, gave him the warning citation, and told him he could get on his way. ***Id.***, ¶35. It held that, under all of the circumstances and based on the objective, reasonable person standard, the subsequent questioning did not constitute a seizure and the defendant's consent was valid. ***Id.***

¶18 For all material purposes, this case is identical to ***Williams***. Humphrey was stopped for speeding on a highway.[4] Kastenschmidt gave her a warning, explained it to her, returned her driver's license, and told her she was "free to go." He then turned toward his car, and Humphrey began walking to hers. As in ***Williams***, the traffic stop had ended when Kastenschmidt asked Humphrey if she would consent to a search of her vehicle. Under the totality of the

[4] The stop occurred in late afternoon, which could be deemed less intimidating than being stopped at 2:30 a.m.

circumstances, a reasonable person in Humphrey's position would have felt free to leave the scene or otherwise terminate the encounter.[5] Consequently, Humphrey was not seized when she consented to the search, and her consent was valid. *See* ***id.***, ¶35.

¶19 In reaching this conclusion, we reject Humphrey's contention that ***State v. Kolk***, 2006 WI App 261, 298 Wis. 2d 99, 726 N.W.2d 337, ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104, and ***Luebeck***, rather than ***Williams***, are controlling under the facts of this case. All three of these cases are distinguishable. In ***Jones***, when the officer asked for consent to search the motorist's vehicle, the officer had already written out a warning citation, returned the identification cards of the motorist and passenger, and the traffic stop had ended. ***Jones***, 278 Wis. 2d 774, ¶¶2-4, ¶7. However, the officer did not communicate permission to leave by either word or action prior to asking to search the vehicle, and the motorist therefore remained seized, rendering his consent to the search invalid. ***Id.***, ¶¶21-23. Similarly, in ***Kolk***, after being lawfully seized pursuant to a traffic stop, the motorist was never "unseized," rendering his consent to a search of his vehicle involuntary. ***Kolk***, 298 Wis. 2d 99, ¶21. As in ***Jones***, the arresting officer asked the motorist whether he could search his vehicle after telling him that he would be receiving a written traffic warning and returning his driver's license and registration to him. ***Kolk***, 298 Wis. 2d 99, ¶¶5-6. However,

[5] As noted in the State's brief, the prosecutor is not required to prove that a motorist knows of his or her right to refuse to consent to the search. *See* ***Ohio v. Robinette***¸ 519 U.S. 33, 39 (1996). There is no Fourth Amendment requirement that a consent search be preceded by a warning that the subject has a right to refuse. ***Williams***, 255 Wis. 2d 1, ¶23 n.7. Moreover, nothing in the record indicates that Kastenschmidt or the backup officer drew a weapon, raised their voices, restrained Humphrey, or implied in any manner that she had to remain and consent to the search.

even though the traffic stop had concluded, the officer never conveyed to the motorist by verbal or physical demonstration, or some other equivalent facts, that the traffic matter was ended and he could be on his way. ***Id.***, ¶¶21-24.

¶20 ***Luebeck*** is also distinguishable. In that case, the officer asked the motorist for permission to search his vehicle while retaining his driver's license, questioning him about other matters, and before issuing the written warning he told the motorist he was going to give him. ***Luebeck***, 292 Wis. 2d 748, ¶¶14-15. The officer did not tell the motorist that he was free to leave. ***Id.***, ¶14. This court concluded that under these circumstances, no reasonable person in the motorist's position would have believed he was free to leave or terminate the encounter, thus rendering his consent invalid. ***Id.***, ¶17.

¶21 Before requesting consent to search the vehicles in ***Jones***, ***Kolk***, and ***Luebeck***, none of the officers indicated to the motorists that the traffic matters were concluded and they were free to leave. In this case, as in ***Williams***, permission to leave was clearly communicated to Humphrey before consent to the search was requested. She therefore was not seized when her consent was given.[6]

[6] Because Humphrey was not detained after Kastenschmidt told her she was free to go, we need not address her argument that Kastenschmidt lacked reasonable suspicion to continue to detain her. Because Humphrey consented to the search despite being free to leave, we need not address her argument that Kastenschmidt lacked reasonable suspicion or probable cause to conduct a nonconsensual, warrantless search of her vehicle.

In her respondent's brief, Humphrey also contends that Kastenschmidt lacked a reasonable basis to believe she posed a danger to him and to perform a pat-down search of her person. However, it is not clear from the testimony at the suppression hearing that a pat-down search was performed. In any event, if it was, the testimony indicates that it occurred after Humphrey consented to the search of the vehicle. In addition, nothing in the record indicates that any evidence was discovered or seized in a pat-down search. Humphrey's argument concerning an alleged pat-down search therefore is immaterial to this appeal.

¶22 Contrary to Humphrey's argument, we also conclude that her consent to the search of her vehicle encompassed the search of the trunk and the duffle bag in it. The standard for measuring the scope of a person's consent to a vehicle search is an objective test, requiring a determination of what a typical reasonable person would have understood by the exchange between the officer and the suspect. ***State v. Matejka***, 2001 WI 5, ¶¶38-39, 241 Wis. 2d 52, 621 N.W.2d 891. The scope of the search is generally defined by its express object. ***Florida v. Jimeno***¸ 500 U.S. 248, 251 (1991). Although a citizen may limit the scope of a vehicle search by the terms of the authorization, if an officer requests consent to search for contraband like illegal drugs in a vehicle and the citizen does not limit the scope of the search, the officer may search containers and other objects that might reasonably hold such contraband. ***Matejka***, 241 Wis. 2d 52, ¶¶37-41. In addition, numerous courts have held that an officer's general request to search a vehicle, and a motorist's consent to a search of the vehicle, encompasses the vehicle's trunk unless the motorist forbids it. *See, e.g.*, ***United States v. McWeeney***, 454 F.3d 1030, 1034-35 (9th Cir. 2006); ***United States v. Forbes***, 181 F.3d 1, 6-7 (1st Cir. 1999); ***United States v. Harris***, 928 F.2d 1113, 1117-18 (11th Cir. 1991); ***United States v. Anderson***, 859 F.2d 1171, 1176 (3rd Cir. 1988).

¶23 The undisputed evidence indicates that when Kastenschmidt asked Humphrey for consent to search her car, he told her that he was looking for any type of illegal contraband that she was not supposed to have, meaning "guns, bombs, knives, anything illegal." This obviously included illegal drugs.

¶24 Nothing in the record indicates that Humphrey limited the scope of the search of her vehicle when she consented to it. Nothing in the record indicates

that Humphrey objected when Kastenschmidt took the keys from the ignition to open the locked trunk.[7] Consequently, Humphrey's consent to the search of the vehicle encompassed a search of the trunk and the duffle bag in it, since both the trunk and the duffle bag could be a repository for weapons or illegal drugs.[8] Her consent similarly encompassed a search of the duct-taped package found by Kastenschmidt in the duffle bag.[9]

¶25 In determining that the search of the duffle bag and the package was permissible, we also note that Humphrey disclaimed ownership of these items, alleging that the duffle bag belonged to an unnamed friend. A person challenging a search bears the burden of establishing that he or she has a reasonable expectation of privacy in the invaded place. ***State v. Orta***, 2003 WI App 93, ¶11, 264 Wis. 2d 765, 663 N.W.2d 358. This depends in part upon whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and the item seized. ***Id.*** Humphrey's denial of any interest in the duffle bag and package therefore constitutes an additional reason for concluding that the

[7] As previously noted, at the suppression hearing, Humphrey's counsel asked Kastenschmidt whether Humphrey came up and asked him again about the search when he went to the trunk area. Kastenschmidt replied that she did. However, since neither Kastenschmidt nor Humphrey testified as to what Humphrey said at this time, no basis exists to conclude that Humphrey objected when Kastenschmidt took the keys from the ignition and opened the trunk. Absent evidence that Humphrey objected or otherwise limited the search in any manner, her general consent to the search of her vehicle included consent to open the trunk. *See* ***United States v. Harris***, 928 F.2d 1113, 1117-18 (11th Cir. 1991).

[8] Humphrey's reliance on ***State v. Johnson***, 187 Wis. 2d 237, 522 N.W.2d 588 (Ct. App. 1994), is misplaced. In ***Johnson***, this court held that a warden's search of a film canister in the glove compartment of a vehicle exceeded the scope of the defendant's consent to the search. ***Id.*** at 240-41. However, the defendant in ***Johnson*** had consented only to a search for firearms, and it could not reasonably be inferred that the film canister contained a firearm. ***Id.*** at 241-42.

[9] In any event, when shown the package by Kastenschmidt, Humphrey consented to the opening of it.

search of those items was constitutionally permissible. The suppression order is therefore reversed and the matter is remanded for further proceedings consistent with this decision.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).