COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP999-CR **Cir. Ct. No. 2009CM283**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL Q. HOCKING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Following his conviction for possession of a switchblade knife, contrary to WIS. STAT. § 941.24(1), Samuel Hocking appeals

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the circuit court's order denying his motion to suppress the knife as evidence. A police officer took the knife from Hocking during a temporary detention, but the officer did not immediately recognize the knife to be an illegal switchblade. The officer then left the scene, forgetting that he was carrying the knife. Upon later realizing that the knife was illegal, the officer cited Hocking for its possession. Hocking argues that the circuit court erred in concluding that the suppression motion should be denied because the knife was, viewed objectively, contraband at the time the officer lawfully took possession of it. The court's order denying suppression and the judgment of conviction that followed are affirmed.

BACKGROUND

¶2 Relevant facts are not in dispute, and there are no credibility determinations at issue. Several officers were dispatched to a disturbance at a tavern. Observing Hocking fighting in the tavern, an officer restrained Hocking. This included temporarily placing Hocking in handcuffs. The same officer asked Hocking if he had any weapons. Hocking replied that he had a knife in one of his pockets. The officer located a knife in Hocking's pocket and removed it, then put the knife in his own pocket "for safekeeping."

¶3 After investigating the disturbance, the officer released Hocking, without issuing him a citation. Instead of returning the knife to Hocking, it "stayed with me at that time, and I forgot to return it" to Hocking, the officer testified at the suppression hearing. After the officer returned to the police station following the incident, he recalled that he still had the knife. The officer conferred with other officers about the knife, and realized for the first time that it was a switchblade, namely a knife that is illegal to possess because it has a blade that opens by pressing a button, spring, or other device. Police first issued Hocking an

ordinance citation for possession of a switchblade, but later voided that in favor of a criminal charge, for reasons not relevant to this appeal.

¶4 The knife outwardly resembles a common lock-blade knife. However, with manipulation it operates as a switchblade. The knife has a sliding switch on its side that functions as a "safety," so that when one pushes a small silver button near the back of the knife, the blade swings out automatically.

STANDARD OF REVIEW AND LEGAL STANDARDS

¶5 Our standard of review and the framework for our analysis are well established:

> We review a motion to suppress applying a two-step standard of review. First, we will uphold the trial court's factual findings unless they are clearly erroneous. Then, we review the application of constitutional principles to those facts de novo. The Fourth Amendment protects against unreasonable searches and seizures. Under both the United States and Wisconsin Constitutions, a warrantless search is per se unreasonable, and evidence derived from it will be suppressed, subject to certain exceptions. These exceptions are jealously and carefully drawn, and the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative.

State v. Robinson, 2009 WI App 97, ¶9, 320 Wis. 2d 689, 770 N.W.2d 721 (citations omitted).

¶6 Turning to the specific standards that apply to evidence seized during the course of a warrantless temporary detention under ***Terry v. Ohio***, 392 U.S. 1 (1968), "[w]hile a ***Terry*** frisk is not a general evidentiary search, an officer is not required to look the other way when [the officer] inadvertently discovers evidence of a crime during the course of a legitimate protective frisk." ***State v.***

McGill, 2000 WI 38, ¶40, 234 Wis. 2d 560, 609 N.W.2d 795. Warrantless seizure and inspection of potential evidence

> is justified when the officer is lawfully in a position to observe the evidence, the evidence is in plain view of the officer, the discovery is inadvertent, and "[t]he item seized in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity."

Id. (citations omitted). If a stop and frisk is lawful, then seizure of evidence of a crime on probable cause during the course of the stop and frisk is fully justified. ***Id.*** (citing 4 Wayne R. LaFave, SEARCH AND SEIZURE, § 9.5(d), at 283 (3d ed. 1996)).

¶7 Also relevant is case law regarding how courts are to treat the subjective motivations of police officers in most Fourth Amendment contexts. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" ***Brigham City, Utah v. Stuart***, 547 U.S. 398, 404 (2006) (quoting ***Scott v. United States***, 436 U.S. 128, 138 (1978)); *see also* ***Whren v. United States***, 517 U.S. 806, 813 (1996) (court "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"). Under this view, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." ***Horton v. California***, 496 U.S. 128, 138 (1990).

¶8 Thus, in "probable cause analysis, the subjective intent of the officer plays no role in the totality of the circumstances that a court considers in determining whether there is probable cause to arrest." ***State v. Kramer***, 2009 WI

14, ¶31, 315 Wis. 2d 414, 759 N.W.2d 598 (citing ***Whren***, 517 U.S. at 813); *see also* ***State v. Malone***, 2004 WI 108, ¶23, 274 Wis. 2d 540, 683 N.W.2d 1 (officer's "subjective motivation may have been to pursue suspected narcotics trafficking, but his subjective motivations play no part in our analysis"); ***McGill***, 234 Wis. 2d 560, ¶¶23-24 (in determining whether a protective frisk was warranted, court considered facts known to the officer which the officer did not use in his "subjective analysis of the situation").

¶9 When applying an objective standard, the question is not what might have been in the mind of the officer at the time of an alleged Fourth Amendment violation, but instead what a "reasonably prudent" officer would have done under the circumstances. *See* ***State v. Johnson***, 2007 WI 32, ¶21, 299 Wis. 2d 675, 729 N.W.2d 182 (citing ***Terry***, 392 U.S. at 27).

DISCUSSION

¶10 Hocking concedes that his temporary detention and the initial seizure of his knife were both lawful under ***Terry***. His contention is that from the moment Hocking was no longer temporary detained, the lawful seizure of his knife ended, and the officer was without authority to continue to possess his knife, because the officer had not yet discovered that the knife was contraband. This contention is without merit, because it ignores the objective standard that applies in this context.

¶11 It cannot reasonably be argued, and Hocking does not argue, that a reasonably prudent officer would take possession of a weapon, whether it is a knife or a firearm, and then return that weapon to its owner, without at least briefly inspecting the weapon to determine whether it constituted contraband. Separately, there was uncontradicted testimony at the suppression hearing suggesting that the illegal status of the knife was readily ascertained by officers at the police station.

Therefore, a reasonably prudent officer in these circumstances would have taken the simple step of inspecting the knife and in doing so would have determined that the officer had probable cause to seize it as a switchblade, while still possessing it under authority of the ***Terry*** detention, the lawfulness of which is not contested. This was not a container that *might* hold contraband; the knife was readily discernable contraband lawfully in the hands in the police. *See* ***United States v. Rodriguez***, 601 F.3d 402, 408 (5th Cir. 2010) (once shotgun properly seized on temporary basis, illegal statuses as sawed-off and having an obliterated serial number "became apparent and it was then subject to permanent seizure as contraband").

¶12 Hocking relies in part on the language of WIS. STAT. § 968.25, which together with § 968.24 are the "stop and frisk" statutes that effectively codify ***Terry***. Hocking relies particularly on the phrases emphasized here in § 968.25:

> When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public places by law abiding persons. If the law enforcement officer finds such a weapon or instrument, or any other property possession of which the law enforcement officer reasonably believes may constitute the commission of a crime, or which may constitute a threat to his or her safety, the law enforcement officer may take it and keep it until the completion of the questioning, *at which time the law enforcement officer shall either return it, if lawfully possessed, or arrest the person so questioned*.

(Emphasis added).

¶13 However, this statute does not add to the analysis. The statute does not purport to adjust the "reasonably prudent officer" standard established in the case law, under which a reasonably prudent officer would not have considered the knife to have been "lawfully possessed" by Hocking. The phrase in WIS. STAT. § 968.25 that is highlighted above, by its own terms, does not apply to require return of *unlawfully possessed* property.

¶14 Hocking asserts that only facts "known to the officer *at the moment* of the intrusion, and *not* facts determined subsequently" may be "considered to determine if a search or seizure is lawful." This is not the law. Probable cause is an objective standard. As a general rule, the subjective intentions of arresting officers are immaterial in judging whether their actions were reasonable for Fourth Amendment purposes. *See* ***Devenpeck v. Alford***, 543 U.S. 146, 153 (2004); ***Whren***, 517 U.S. at 814. Therefore, it does not matter that the officer testified at the suppression hearing that he "forgot" to return the knife, implying that he should have returned it to Hocking at the time officers decided to release Hocking from temporary detention. Under the objective view, a reasonably prudent officer would not have returned the knife without first inspecting it and discovering its illegality.

¶15 Hocking cites ***United States v. Place***, 462 U.S. 696 (1983), for the proposition that a temporary property seizure made under authority of ***Terry***, as supported by reasonable suspicion, may violate the Fourth Amendment when police take too much time in attempting to develop the probable cause they seek to establish. However, this case does not involve temporarily seized containers *suspected* to contain contraband, as in ***Place***. ***Id.*** at 700-01. This case involves temporarily seized contraband, which a reasonably prudent officer would have recognized as such while still in lawful possession of the contraband.

¶16 For these reasons, the circuit court made no clearly erroneous factual findings, and it is evident that the Fourth Amendment does not require suppression of the knife as evidence. Accordingly, the court's judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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