COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2493-CR **Cir. Ct. No. 2009CM554**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CINDY R. BILLIPS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded*.

¶1 NEUBAUER, P.J.[1] The State appeals from an order suppressing evidence obtained following Cindy R. Billips' arrest for operating a motor vehicle

[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.

while intoxicated (OWI). The State contends that the circuit court erred in suppressing the marijuana seized from Billips' vehicle during a search incident to her arrest, as well as her statements made after the evidence was obtained. Based on the totality of the circumstances, we conclude that the search of Billips' vehicle incident to her arrest for OWI was lawful and, therefore, the circuit court erred in suppressing the evidence recovered during that search. We further conclude that the admissibility of Billips' statements, should the State attempt to rely on them on remand, depends on whether the State is able to carry its burden at a ***Miranda-Goodchild***[2] hearing. We reverse and remand for further proceedings.

FACTS

¶2 Billips is charged with possession of tetrahydrocannabinols (THC). The facts underlying Billips' OWI arrest and subsequent possession charge were testified to at the hearing on Billips' motion to suppress the marijuana found in her car. Deputy David Kinservik, of the Racine County Sheriff's Department, testified that on March 4, 2009, he stopped the defendant's car along the I-94 corridor for speeding, eighty miles per hour in a sixty-five mile per hour zone. Billips was the driver of the car and another individual was sitting in the passenger front seat. As Kinservik approached the car, he noticed two open bottles in the back of the car, a soda bottle and a glass bottle with dark-colored fluid, resembling alcohol. Kinservik additionally noticed a black plastic bag on the floorboard between the passenger's legs with what appeared to be spilled liquid on top of it.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966) and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶3 While speaking to Billips, Kinservik noticed an odor of intoxicants coming from the inside of the car and asked the passenger to exit the car so that Kinservik could remove the open bottles from the backseat. After Kinservik removed the open bottles from the backseat, he asked Billips to perform a field sobriety test, which she did not pass. Kinservik arrested Billips for OWI. Kinservik secured Billips in handcuffs and placed her in the backseat of the police car. Kinservik testified that he also placed the passenger in the police car because it was cold that day. He then searched the car for any other open intoxicants. He found a marijuana cigar end, a "blunt," in plain view on the center console of the car. The blunt crumbled when Kinservik picked it up. Kinservik then searched a purse that was in the backseat of the car and found more marijuana inside the purse. Although not testified to at the suppression hearing, the complaint reflects that Billips informed Kinservik that the purse was hers. Kinservik testified that he then removed the black plastic bag from the front floorboard of the car (observed when Kinservik initially approached the car) and the liquid spilled onto the floorboard.

¶4 Billips was subsequently charged with possession of THC. Billips did not challenge probable cause for the OWI arrest, but filed a motion to suppress the marijuana seized from her vehicle and all derivative evidence as resulting from an illegal search under ***Arizona v. Gant***, 556 U.S. 332, 129 S. Ct. 1710, 1719 (2009). The circuit court granted Billips' motion. The State appeals.

DISCUSSION

¶5 Billips does not challenge the initial stop of her vehicle for a speeding violation, nor does she challenge the underlying facts relating to her OWI arrest or that it was based on probable cause. The issues on appeal are

whether, subsequent to her arrest for OWI, (1) the search of the car was lawful under ***Gant*** and, if not, whether the good faith exception to the exclusionary rule applies and (2) Billips' statements were properly suppressed by the circuit court or whether a ***Miranda-Goodchild*** hearing is necessary.

¶6 In reviewing a circuit court's ruling on a motion to suppress evidence, we will uphold the court's findings of historical fact unless they are clearly erroneous. ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. However, whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact that we review independently. ***Id.***, ¶11.

¶7 The scope of a constitutionally valid vehicle search incident to arrest, as was conducted here, was recently addressed by the United States Supreme Court in ***Gant***. *See* ***State v. Dearborn***, 2010 WI 84, ¶3, 327 Wis. 2d 252, 786 N.W.2d 97 (adopting ***Gant*** "as the proper interpretation of the Wisconsin Constitution's protection against unreasonable searches and seizures"). In ***Gant***, the Court held that, incident to a lawful arrest, police officers may search a vehicle without a warrant when: (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or (2) "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" ***Gant***, 129 S. Ct. at 1719 (citation omitted). The State contends that the search of Billips' car is constitutional under ***Gant*** because it was reasonable to believe that evidence relevant to the crime of arrest (OWI) would be found in her car. We agree.

¶8 In reaching our conclusion, we reject Billips' contention that Kinservik's removal of an open bottle of alcohol prior to her arrest renders the

subsequent search of her vehicle unreasonable under ***Gant***. Specifically, Billips contends that at the point of her arrest, "it was not reasonable to believe there would be any further physical evidence of OWI in the vehicle…. [I]f Ms. Billips left intoxicants in plain view in her vehicle, it is not reasonable to assume there were others stashed away out of the deputy's sight." In other words, Billips argues that because Kinservik had already removed some evidence from her vehicle, it was not reasonable to believe there would be any further physical evidence of OWI in the vehicle. This same argument was considered by this court in ***State v. Smiter***, 2011 WI App 15, ¶16, 331 Wis. 2d 431, 793 N.W.2d 920, and rejected as "nonsensical." There, the court observed, "***Gant*** expressly permits searches for evidence relevant to the crime of arrest and does not require police to stop that search once *some* evidence is found." ***Smiter***, 331 Wis. 2d 431, ¶16.

¶9 Here, it was reasonable for Kinservik to believe that further evidence related to Billips' OWI arrest might be found in the vehicle. We agree with the State that this would include alcohol or any other substance that would contribute to the impairment of the driver.[3] At the time of the search, Kinservik had yet to remove the plastic bag with liquid on top of it. Further, when he entered the

[3] WISCONSIN STAT. § 346.63(1)(a), governs the offense of operating while under the influence of intoxicant or other drug. It provides that no person may drive or operate a motor vehicle while

> [u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, *or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving* ….

Id. (Emphasis added.)

vehicle, Kinservik testified: "I found what I know to be an end of a marijuana cigar, a blunt, that was in plain view when I entered the vehicle."[4] This additional discovery further supports the reasonableness of the search of Billips' vehicle, including the purse in the back seat. *See* ***Gant***, 129 S. Ct. at 1719 (citing ***New York v. Belton***, 453 U.S. 454 (1981) and ***Thornton v. United States***, 541 U.S. 615 (2004), in which the defendants were arrested for drug offenses, as cases in which "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein"). Under ***Gant***, Kinservik could lawfully search both the vehicle and the purse for further evidence related to OWI.[5]

¶10 Even if the search of the vehicle, including Billips' purse, exceeded the scope of ***Gant***, the search is lawful under the good faith exception to the exclusionary rule. In ***Dearborn***, the Wisconsin Supreme Court examined the effect of ***Gant*** and held that the retroactivity rule does not bar application of the

[4] While the circuit court found that the blunt had not been tested and was not identifiable "contraband," Kinservik's observation, based on his training and experience, was reasonable and contributed to a reasonable belief that additional evidence might remain in the vehicle. Kinservik testified that he had been a deputy for "[a]bout ten-and-a-half years" and had made "between 150 and 200" OWI arrests.

[5] We reject Billips' attempt to distinguish Kinservik's search of Billips' purse from the lawful search of a duffel bag in ***State v. Pallone***, 2000 WI 77, ¶31, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled in part by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. Relying on ***Pallone***, Billips argues: "[T]he officer had probable cause to search the 'fairly large' duffel bag, which was about two-and-a-half feet long, located on the bench of the [truck] cab because '[t]his spacious container had the capacity to hold additional open or closed bottles of beer." (Citing ***Pallone***, 236 Wis. 2d 162, ¶77). From this, Billips maintains that "Kinservik did not have probable cause to search [her] purse because, in contrast to the large duffel bag in ***Pallone***, a woman's purse typically does not have 'capacity to hold additional open … [intoxicants].'" We note that there is nothing in the record to indicate the size of Billips' purse and we see no reasonable basis to distinguish between the lawful search for intoxicants in the duffel bag in ***Pallone*** and Kinservik's search of Billips' purse in this case.

good faith exception in situations where police act in objectively reasonable reliance on settled law. ***Dearborn***, 327 Wis. 2d 252, ¶¶33-34.

¶11 Here, Kinservik relied upon well-settled Wisconsin law during Billips' arrest on March 4, 2009.[6] The controlling (or settled) law at the time of the arrest was ***Belton*** and ***Fry***. *See* ***Belton***, 453 U.S. at 471-72; ***State v. Fry***, 131 Wis. 2d 153, 178, 388 N.W.2d 565 (1986). Under ***Belton***, a police officer who had made a lawful custodial arrest of the occupant of an automobile could, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile and any containers therein. ***Belton***, 453 U.S. at 460. In ***Fry***, the Wisconsin Supreme Court further clarified the ***Belton*** rule by articulating that "all closed containers, locked or unlocked, in an automobile which may be searched incident to arrest can be searched." ***Fry***, 131 Wis. 2d at 178. Because Kinservik's search of Billips' vehicle incident to her arrest was made in objectively reasonable reliance upon clear and settled Wisconsin precedent, the good faith exception to the exclusionary rule applies and the marijuana evidence is admissible. *See* ***Dearborn***, 327 Wis. 2d 252, ¶¶50-51.

¶12 Having determined that the physical evidence obtained during the search of Billips' vehicle is admissible, we next turn to whether Billips' post-arrest statements acknowledging ownership of the purse are admissible. Upon being charged, Billips filed a "motion to suppress physical and derivative evidence." However, neither the motion nor the parties' briefing addressed the admissibility

[6] The search in question occurred on March 4, 2009. ***Arizona v. Gant***, 556 U.S. 332, 129 S. Ct. 1710 (2009), was argued on October 7, 2008, and decided on April 21, 2009.

of Billips' statements to Kinservik following her arrest. At the start of the motion hearing, Billips identified the issue as a "motion to suppress the marijuana that was found in the car." Again, no mention was made of Billips' statements and no testimony was elicited or argument made as to their admissibility.

¶13 The circuit court's written decision notes the absence of any argument by either party as to "whether Billips' statements made admitting the purse was hers and thus making possession of [THC] constructively hers in her purse [are] admissible contrary to interrogation after arrest and confinement." The circuit court nevertheless suppressed Billips' statements.

¶14 Billips contends on appeal that the record supports the circuit court's ruling. However, the circuit court appears to have relied on the facts set forth in the complaint—evidence not offered at the motion hearing. Thus, if the State seeks to admit the post-arrest statements on remand, this issue must first be addressed at a ***Miranda-Goodchild*** hearing. There, the State would bear the burden of demonstrating that Billips' post-arrest statements are admissible. *See* ***State v. Jiles***, 2003 WI 66, ¶37, 262 Wis. 2d 457, 663 N.W.2d 798.

CONCLUSION

¶15 We conclude that the search of Billips' vehicle incident to her arrest for OWI was lawful under the Supreme Court's decision in ***Gant*** because it was reasonable to believe that the vehicle contained evidence relevant to her arrest. Therefore, the circuit court erred in suppressing the evidence recovered during that search. We further conclude that any attempt by the State to introduce Billips' post-arrest statements must be prefaced by a ***Miranda-Goodchild*** hearing. We reverse the circuit court's suppression of the marijuana evidence and affirm the suppression of Billips' statements.

By the Court.—Order reversed and cause remanded.

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