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February 11, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2261-CR State of Wisconsin v. Jonathan J. Adams (L.C. # 2011CF4280)

Before Blanchard, P.J., Higginbotham, Sherman, JJ.

Jonathan Adams appeals from a judgment of conviction of possession of cocaine with intent to deliver as a second and subsequent offense. He argues that the police lacked a reasonable suspicion to stop the vehicle in which he was a passenger and that his right to due process was violated by the failure to follow department procedure to preserve the dashboard video of the stop. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We uphold the trial court's rulings on Adams' motions to suppress and for dismissal and affirm the judgment.

Adams was a passenger in a vehicle stopped by police on suspicion that the occupants were smoking marijuana. Adams was asked to exit the vehicle and a protective pat down revealed that he was in possession of cocaine. Adams moved to suppress evidence on the ground that the vehicle stop was unconstitutional.[2] After his motion was denied, he moved to dismiss the prosecution because the dashboard video of the stop had not been preserved in accordance with the police department's standard operating procedures. Following the denial of his motion to dismiss, Adams entered a guilty plea to the possession charge.

An investigative traffic stop must be constitutionally reasonable and there must be a reasonable suspicion that the subject of the stop has committed, was committing, or is about to commit a crime. ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The reasonableness of the stop is based on the totality of the facts and circumstances. ***Id.*** Whether a traffic stop is reasonable is a question of constitutional fact and we review the trial court's findings of historical fact under the clearly erroneous standard and independently apply those facts to the constitutional principles. ***Id.***, ¶8.

The two officers conducting the stop testified that they smelled a strong odor of burnt marijuana coming from the vehicle when it turned onto the same street as the officers' squad car

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] In addition to evidence of the cocaine, Adams sought to suppress a custodial statement he made.

and as the squad car followed it. They believed the occupants of the vehicle to be smoking marijuana. They did not see smoke coming from the windows of the vehicle. Adams testified that he and the driver were not smoking marijuana in the vehicle.

The trial court found the officers' testimony about the stop credible. Adams challenges the trial court's credibility determination and argues that the officers' testimony is incredible as a matter of law because the officers did not observe expected corroborating evidence, such as smoke coming from the car, occupants dropping something from the windows, or the discovery of smoking paraphernalia, marijuana or seeds in the vehicle. He also suggests the officers' credibility is questionable because they gave conflicting accounts of whether the driver or passenger stated he had smoked marijuana earlier.

Due regard is given to the trial court's assessment of the credibility of witnesses and in the vast majority of cases credibility determinations are unassailable. ***State v. Trecroci***, 2001 WI App 126, ¶2 & n.1, 246 Wis. 2d 261, 630 N.W.2d 555. Deference is given because the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Because the determination is based on the trial court's observation, it is unnecessary for there to be corroborating evidence to accept the witness's testimony as credible. Nor, contrary to Adams' assertion, is the trial court required to set forth what aspects of the witness's demeanor it relied on to find the witness's testimony credible or why it found one witness more credible than another. *See* ***State v. Young***, 2009 WI App 22, ¶¶18-19, 316 Wis. 2d 114, 762 N.W.2d 736.

To be incredible as a matter of law, the testimony must conflict with the uniform course of nature or established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d

824 (1975). Contradictions in minor points of testimony do not render the testimony inherently or patently incredible but merely create a question of credibility for the trier of fact to resolve. ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). In response to Adams' assertion that there could not be a burning odor without smoke, the trial court drew on life experience to accept that the odor could be detected from a nearby vehicle without the observation of smoke from the vehicle. *See* ***State ex rel. Cholka v. Johnson***, 96 Wis. 2d 704, 713, 292 N.W.2d 835 (1980) (the court, like a jury, may apply common knowledge and individual observations and experience). In short, reliance may properly be placed on the detection of marijuana odor coming from a vehicle. *See* ***State v. Secrist***, 224 Wis. 2d 201, 210-11, 589 N.W.2d 387 (1999) (the odor of marijuana coming from an automobile provides probable cause for an officer to initiate a search). Based on the testimony the trial court found credible, there was reasonable suspicion for the investigatory stop and the motion to suppress evidence was properly denied.

Testimony at the suppression hearing established that the dashboard video recorder was activated when the squad car's light and siren were activated. However, the resulting video was not preserved according to the police department's standard operating procedure and thus, it could not be provided to the defense. Adams argues that destruction of the dashboard video violated his right to due process and deprived him of a meaningful opportunity to present a defense. He asserts that the prosecution must be dismissed.[3]

[3] By his guilty plea, Adams forfeited the right to claim error in the trial court's denial of his motion to dismiss. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (stating the general rule that a guilty plea is a forfeiture of all nonjurisdictional defects, including constitutional claims). Recognizing that it wastes judicial resources to require a defendant to go to trial just to preserve a claim based on evidence taken pretrial and a constitutional issue adjudicated by the trial court, we exercise our discretion to address the forfeited claim. *See* ***State v. Aniton***, 183 Wis. 2d 125, 130, 132, 515 N.W.2d 302 (Ct. App. 1994) (Schudson, J., concurring).

When reviewing a claim that evidence was lost or destroyed in violation of due process, we independently apply the constitutional standard to the facts as found by the trial court. ***State v. Greenwold***, 189 Wis. 2d 59, 66-67, 525 N.W.2d 294 (Ct. App. 1994). If the destroyed evidence is apparently exculpatory, the failure to preserve it violates a defendant's due process rights. ***Id.*** at 67. If the evidence is only potentially exculpatory, to establish a due process violation the defense must show that the police acted in bad faith by destroying it. ***Id.***

Evidence is deemed apparently exculpatory when its exculpatory nature was apparent to the government actor or actors who failed to preserve it, and the evidence is of such a nature that the defendant cannot obtain comparable evidence by other reasonable means. ***State v. Munford***, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264. Adams argues that the dashboard video was apparently exculpatory because it would have provided "compelling proof that he was seized and searched without justification," and that the officers fabricated a basis for the stop. We are left to wonder how it would establish that the reason for the stop was fabricated. It is undisputed that the video was not activated until the squad's light and siren were turned on. The video would not have captured the observations that Adams wants to challenge. Moreover, the officers testified that they did not observe smoke from the car so a video confirming that fact is not exculpatory. The trial court found that the officer downloaded the video after his shift and that it was not preserved based on the officer's misunderstanding that there was a ninety-day window for someone to request the video and require the officer to complete a video file request form which would have preserved it. That finding is not clearly erroneous. We reject Adams' suggestion the failure to preserve the video amounts to knowledge that the video was exculpatory for Adams. Adams fails to establish that the video was apparently exculpatory.

Turning to the trial court's conclusion that the video of the investigatory stop was only potentially exculpatory, we consider whether the police acted in bad faith by destroying it. "[B]ad faith can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Greenwold***, 189 Wis. 2d at 69. As we have already set forth, the trial court's finding for the reason the officer failed to preserve the video was not clearly erroneous. The trial court found that the officer's failure to follow the department's standard operating procedure was negligence. "[T]here is no bad faith when the police negligently fail to preserve evidence which is merely potentially exculpatory." ***Id.*** at 68.

Adams' right to due process was not violated by the destruction of the dashboard video. His motion to dismiss the prosecution was properly denied.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals