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DISTRICT IV

November 6, 2015

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

2015AP121-CR State of Wisconsin v. John E. Gordon (L.C. # 2011CF1019)

Before Higginbotham, Sherman, and Blanchard, JJ.

John Gordon appeals a judgment of conviction and a stipulated order on Gordon's postconviction motion. 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 (2013-14).[1] We summarily affirm.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In May 2011, Gordon was charged with multiple drug offenses and obstructing an officer. Gordon moved to suppress evidence obtained during a police search of the vehicle Gordon was driving after police attempted to stop Gordon, Gordon ran from the vehicle, and Gordon was placed under arrest for obstruction. Gordon argued that the police discovered the evidence by means of an illegal search of the vehicle because Gordon was arrested for obstructing and placed in the police squad car prior to the search. *See* ***Arizona v. Gant***, 556 U.S. 332, 351 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.").

At the suppression hearing, two police officers testified as to the events leading to the search. The first officer, Officer Anthony Frey, testified that, after Frey arrested Gordon and placed Gordon in Frey's squad car, Frey was informed by other officers on the scene that suspected drugs had been located in the vehicle. Frey then looked inside the vehicle without entering it, and observed a clear plastic baggie with what he believed to be crack cocaine in the center console area. The State played the first forty seconds of Frey's police squad video camera recording, which showed Gordon running from the car, leaving the driver's door open.

The second officer, Officer Corey Howes, testified that, after Gordon was placed in the squad car, Howes approached the vehicle and shone a flashlight into the passenger side to illuminate the interior of the vehicle. Howes observed a clear cup containing a baggie with what he believed was cocaine, in a cup holder between the two front seats. Howes advised Frey that he had observed suspected drugs in the vehicle, and then Howes conducted a search of the vehicle, revealing drugs and drug paraphernalia. On cross-examination, Howes stated that the driver's side door was open, but that he did not know who opened it.

The circuit court denied the suppression motion, finding that the officers observed the suspected drugs in the car in plain view. *See* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992) (explaining that "no search occurs when an officer views … evidence that is in plain view" when the officer has "lawful right of access" to the location from which the evidence is viewed). The court found that the vehicle door was open and that both officers saw the suspected drugs in the vehicle without entering the vehicle.

Gordon pled guilty to possession of cocaine with intent to deliver. After sentencing, Gordon filed a postconviction motion arguing that the circuit court erred by denying his suppression motion because the court's factual findings were demonstrably false. Gordon noted that, while the first forty seconds of the police squad video that was played at the suppression hearing showed that Gordon left the driver's side door open when he ran from the vehicle, the next part of the video, which was not played at the suppression hearing, showed that the owner of the car shut the car door before police approached the vehicle and that the police opened the car door themselves. The court stated at a hearing that it would allow Gordon to make a record, but would not hold another suppression hearing. The court entered an order, on the parties' stipulation, to include the complete police squad video camera recording in the record.

Gordon argues that the circuit court erred by denying his suppression motion because the court's underlying factual finding that the driver's side door was open, leaving the suspected drugs in plain view, was clearly erroneous. He contends that the part of the video played at the suppression hearing showing that the car door was left open and Howes' testimony that the driver's side door was open is refuted by the rest of the police squad video. Thus, according to

Gordon, the court's finding that the evidence was in plain view was based on an erroneous finding of fact.[2] We disagree.

At the outset, we note that Gordon has not provided a legal basis to supplement the record of a suppression hearing during postconviction proceedings outside the context of claims of newly discovered evidence or ineffective assistance of counsel, nor are we aware of any. In any event, we are not persuaded that the issue of the car door being open or closed is dispositive.

The police officers testified that they were able to observe the suspected cocaine in a cup in the vehicle without entering the vehicle. The circuit court deemed that testimony credible, and we have no basis to disturb the court's credibility determination. *See* ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). While one officer testified, and the circuit court found, that the car door was open when police approached the car, nothing indicates that the court's determination that the officers were able to view the suspected drugs from outside the car was premised on whether the driver's side car door was open or closed. Significantly, Howes testified that he observed the cocaine by shining his flashlight into the passenger side of the car, and then informed Frey that he had observed the drugs; Frey testified that he approached the car after being informed that the drugs had been observed. Because the court deemed that testimony credible, the court had a reasonable basis to find that the drugs were discovered in plain view.

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[2] To the extent that Gordon argues that the officers' testimony at the suppression hearing was otherwise inherently incredible, we reject that argument. This would be based on Officer Frey's testimony that he suspected that the object in Gordon's hand as Gordon ran from the vehicle was contraband, arguably contrary to his police report and preliminary hearing testimony that he could not identify the object, and Officer Howes' testimony that the cup in the vehicle containing the baggie of cocaine was a clear cup, arguably contrary to the car owner's testimony that she keeps a cup in her car that is "frosted or glossy looking for three-fourths of it, and then it gets clear toward the remaining top."

(continued)

Gordon also argues that the circuit court judge was biased. However, Gordon concedes that he did not make that assertion in the circuit court, and argues that this court should nonetheless address the issue in the interest of justice. *See* ***State v. Davis***, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996). We decline to address the issue of judicial bias for the first time on appeal.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

Gordon has not shown that the officers' testimony on these points was inherently or patently incredible. *See* ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).