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

2017AP1692-CR State of Wisconsin v. Darrious D. Cooks (L.C. # 2016CF4032)

Before Kessler, P.J., Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Darrious D. Cooks appeals the judgment convicting him of one count of possession of heroin (three grams or less) with intent to deliver. *See* WIS. STAT. § 961.41(1m)(d)1. (2015-16).[1] He argues that the circuit court erroneously denied his motion to suppress evidence related to a

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

search of his vehicle following a traffic stop.[2] Based on 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. Because the search of Cooks' vehicle was justified by the officers' reasonable suspicion that Cooks was dangerous and might have access to a weapon, we summarily affirm.

Background

The State charged Cooks with one count of possession with intent to deliver heroin stemming from a traffic stop. Cooks sought to suppress the evidence seized from his vehicle. At the evidentiary hearing that followed, only one witness testified: the police officer who initiated the stop.[3]

The officer testified that he and his partner observed a vehicle in the area of West Burleigh Street and West Lisbon Avenue in Milwaukee at around 12:55 a.m. He observed several traffic and equipment violations. Namely, the vehicle initially stopped in a crosswalk at a red light, was later speeding, had a cracked windshield, and the taillights were not properly illuminated. The officer also saw the dome light on and the vehicle "drift[] to the right, coming inches from striking the curb line[.]"

At that point, the officer initiated a traffic stop, and as Cooks' vehicle slowed to pull over, the officer testified that he "observed the driver, the sole occupant, make a very drastic reaching movement across to his right hand side, all the way across the front bench seat or front

[2] The Honorable Timothy Witkowiak presided over the suppression hearing and ruled on Cooks' motion. A person may appeal an order denying a motion to suppress even though that person has pled guilty. WIS. STAT. § 971.31(10).

[3] At the time of the hearing, the witness was employed as a detective with the police department. We refer to him as a police officer because that was his position at the time of the traffic stop.

seat area where he dipped below where I couldn't actually see him anymore." The officer described it as "one long reaching movement across" that took two seconds. Upon seeing the movement, according to the officer, "[m]y concern was that individual's attempting to maybe conceal or even more important[ly], possibly retrieve something from that side of the vehicle that could hurt myself or my partner possibly a weapon."

As Cooks pulled his vehicle to a stop on a main thoroughfare, the officer testified that there was "nothing unusual or anything that I felt that it was going to flee." The officer explained that there were cemeteries on both sides of the thoroughfare and street lamps. There were not many vehicles on the road at the time of the stop. The officer testified that the area just south of where the stop took place is "not an area that is typically known for shootings or shots fired, but that is a main thoroughfare where there [are] a lot of robberies," some of which involved weapons.

The officer relayed that upon making contact, Cooks did not have any identification on him and seemed nervous. Specifically, Cooks "kind of avoided a little bit of eye contact. His breathing pattern wasn't necessarily normal, a little excited, but based on that movement, reaching movement or that leaning movement across the seat without having an ID as well I asked Mr. Cooks to exit the vehicle." The officer said that it is not uncommon for people to be nervous when they get pulled over but said "it's not typically normal to avoid … eye contact."[4]

Cooks provided his name, and in answer to the officer's inquiry, told him that he was not on probation or parole but had been arrested "for minor stuff." Cooks also told the officer that

[4] On cross-examination, the officer acknowledged that he did not mention Cooks appearing overly nervous or not making eye contact in the police report he drafted.

the vehicle was registered to his girlfriend, and he subsequently stepped out of the vehicle without incident. The officer did not recall having any prior interactions with Cooks before this traffic stop.

The officer did not suspect Cooks of any type of violent crime or drug offense, and Cooks gave the officers permission to search him. He was not armed, and he subsequently sat on the curb behind his vehicle at the officer's request. The officer testified that he proceeded to search Cooks' vehicle while his partner stood near Cooks. When the officer opened the front passenger door, he observed in the map pocket a box for a digital scale, a digital gram scale, and a white oval-shaped pill that turned out to be ibuprofen. He removed and opened the scale box, which was empty, and then checked the center armrest area, where he found two digital scales.[5] He then moved to the driver's side and searched under the driver's seat where he moved an open box of sandwich bags and found a sandwich bag behind it that contained what was later determined to be 1.94 grams of heroin.

The circuit court denied Cooks' suppression motion after concluding that police had reasonable suspicion to justify a protective search. Cooks pled guilty to the offense as charged and was sentenced to one year of initial confinement and one year of extended supervision.

He now appeals challenging the circuit court's denial of his motion to suppress.

Discussion

[5] The officer testified that he found one scale in the map pocket and two additional scales in the center armrest area. According to the complaint, the officers found a total of two digital scales.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect citizens from unreasonable searches and seizures. *See* ***State v. Rutzinski***, 2001 WI 22, ¶13, 241 Wis. 2d 729, 623 N.W.2d 516. Therefore, when a defendant challenges the lawfulness of a search or seizure through a motion to suppress evidence, a question of constitutional fact is presented. ***State v. Sveum***, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317.

A reviewing court applies a two-part test when reviewing the denial of a motion to suppress. ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed *de novo*. ***Id.***

The lawfulness of the initial traffic stop is not at issue on appeal, and the parties do not dispute the underlying facts. Instead, the sole issue before us is whether the facts support the protective search of Cooks' vehicle. Cooks submits that an otherwise unremarkable traffic stop was transformed into a nonconsensual protective search. He argues that police were not justified in conducting a protective search of his vehicle because it was not objectively reasonable to believe he was dangerous and had access to a weapon. We disagree.

Whether an officer may "conduct a protective search" of a car is "'decide[d] on a case-by-case basis, evaluating the totality of the circumstances, whether an officer had reasonable suspicion to justify a protective search in a particular case.'" ***State v. Buchanan***, 2011 WI 49, ¶9, 334 Wis. 2d 379, 799 N.W.2d 775 (citation omitted). "'[R]easonable suspicion'" is a "'commonsense'" concept that implicates "'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" ***Id.*** (citation and one set of quotation marks omitted). Thus, there must be a balance between danger and privacy, and when

officers make a traffic stop, the danger is significant. *See* ***id.***, ¶18 (noting that "traffic stops are dangerous for law enforcement, and permitting a limited search is a reasonable way to balance the competing interests involved"). We apply this analysis in assessing whether the officer violated Cooks' Fourth Amendment rights when he searched the vehicle.

Here, the circuit court summarized the officer's testimony before ruling on Cooks' motion. The circuit court referenced the officer's testimony of Cooks' "long reaching movement after the squad lights were on towards the passenger side of the vehicle," and the officer's "concern[] that the defendant at the time he made that reach, that he was trying to retrieve something and was concerned that perhaps it was a weapon." The circuit court additionally noted the testimony that Cooks did not produce a driver's license or valid identification card and highlighted the officer's testimony that there had been robberies in the vicinity of the stop and that the officer was concerned about safety. The circuit court relayed the officer's testimony "that his interaction with the defendant was somewhat unusual, in that the defendant avoided eye contact with him." The circuit court implicitly found the officer's testimony was credible.

Based on his testimony, the officer's concern that there might be a gun or other weapon in the vehicle was reasonable. "The Fourth Amendment does not require police to ignore their reasonable beliefs that an individual was concealing a weapon[.]" ***State v. Bailey***, 2009 WI App 140, ¶48, 321 Wis. 2d 350, 773 N.W.2d 488. Cooks had not been arrested or handcuffed at the time of the search; consequently, the potential presence of a gun in the vehicle was a significant safety concern because Cooks could have access to it.[6] *See* ***id.***, ¶41. "It was not unreasonable

[6] As Cooks points out, there was no testimony indicating that he would have been arrested or ticketed at the completion of the stop had the contraband not been found.

for the officer to make sure that he would not be returning to a vehicle that housed a gun that [Cooks] could then turn on the officers." *See* ***id.***, ¶48.

Cooks relies on ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182, to challenge the basis for the search on grounds that furtive-type movements are not enough to legitimize a search. He claims the facts in ***Johnson*** are virtually indistinguishable from those presented here. We are not convinced.

In that case, the issue before the Wisconsin Supreme Court was whether Johnson's movement, standing alone, was sufficient to establish reasonable suspicion. ***Id.***, ¶34. As Johnson was being stopped for a traffic violation, the police saw him "lean forward, which appeared to be reaching underneath his front seat." ***Id.***, ¶3 (one set of quotation marks omitted). An officer testified that this was "a strong furtive movement" such that a portion of Johnson's head and shoulders disappeared from view. ***Id.*** (one set of quotation marks omitted). That officer and another testified that they thought, based on their experience and training, that Johnson was attempting "to conceal contraband or weapons." ***Id.*** They ordered him out of the car and patted him down for their safety. ***Id.***, ¶¶5-6. An officer then searched Johnson's vehicle and found marijuana under the driver's seat. ***Id.***, ¶8.

In deciding the case, our supreme court concluded "that the presence of a single factor, if sufficiently compelling, may give rise to reasonable suspicion justifying a protective search" if it was "a … highly persuasive factor." ***Id.***, ¶35. However, the court in ***Johnson*** continued, "[u]nder the totality of the circumstances present in this case, we conclude that Johnson's 'head and shoulders' movement did not give [the officer] reasonable suspicion to conduct a search of Johnson's person and car." ***Id.***, ¶36. There, the officers were faced only with "a traffic violation for failure to signal a turn, and the head and shoulders movement." ***Id.***, ¶40. The court in

Johnson additionally noted that the stop occurred in the early evening hours in a well-lit area. ***Id.***, ¶41.

Here, while Cooks' furtive moment may have been a substantial factor in establishing reasonable suspicion, it was not the only factor. Other circumstances justifying the protective search in this case included the following: Cooks' lack of a driver's license or other identification card, which meant securing such was not the purpose behind his reach; the time of day, 12:55 a.m.; the area, which was known to have a lot of robberies, some involving weapons; the officer's concern about safety; and Cooks' unusual avoidance of eye contact. *See generally* ***Buchanan***, 334 Wis. 2d 379, ¶¶12 & 15 (noting that "'unusual nervousness of a suspect may indicate wrongdoing'" and the officer's fear or belief that his or her safety is in danger is part of the totality-of-the-circumstances calculus) (citation omitted); ***State v. McGill***, 2000 WI 38, ¶32, 234 Wis. 2d 560, 609 N.W.2d 795 (explaining that "[w]e have consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter"). The circuit court properly denied Cooks' motion to suppress.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals