OFFICE OF THE CLERK

WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

March 14, 2019

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233-1425

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Andrea Taylor Cornwall
Asst. State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Timothy C. Samuelson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP685-CR State of Wisconsin v. Charles Maurice Merriett (L.C. # 2016CF82)

Before Kloppenburg, 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).

Charles Merriett appeals a circuit court judgment convicting him of two counts of possession with intent to deliver controlled substances. Merriett argues that the court erred in denying his suppression motion because police obtained evidence from an unconstitutional search of his vehicle. 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(1) (2017-18).[1] We affirm based on the inevitable discovery doctrine.

Milwaukee police officer John Shipman was the sole witness at the suppression hearing. Shipman testified that he and a second officer suspected Merriett of drug activity after observing Merriett exit the driver's side of a running vehicle with dark tinted windows at a gas station known for drug dealing. Shipman described the window tint as "extremely dark," so that it was plainly illegal and impossible to see into the vehicle. He ran the vehicle's license plates and discovered that they did not "list" to the vehicle and were not valid. Shipman approached Merriett, who claimed to have been driving a different vehicle and became very nervous after that vehicle drove off. Shipman detained Merriett and placed him in handcuffs in the back of a squad car. Meanwhile, the second officer made contact with a passenger in the vehicle and had the passenger step out of the vehicle.

While Merriett and the passenger were detained, Officer Shipman approached the vehicle, opened a door, and looked inside. According to Shipman, he was attempting to determine if there was anyone else in the vehicle or if there were weapons in plain view. Shipman saw what appeared to be controlled substances in a door handle area. Further investigation and testing showed the presence of cocaine and heroin, forming the basis for the charges to which Merriett pled guilty.

In addition, Merriett received a citation for a registration violation. Officer Shipman testified that police could have also cited Merriett for a window tint violation. He further

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

testified that it was a general police practice to tow vehicles with a registration violation or window tint violation, and that it would have been unlawful to operate Merriett's vehicle or to park it on a city street.

In reviewing a motion to suppress, we apply a mixed standard of review. We review the circuit court's findings of historical fact under the clearly erroneous standard. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. However, we review de novo the application of constitutional principles to those facts. ***Id.***

The parties dispute whether Officer Shipman's search of Merriett's vehicle was a lawful protective sweep or a search incident to arrest. Additionally, they dispute whether, even if Shipman's search of the vehicle was unlawful, the drugs found in the vehicle would inevitably have been discovered. We will assume, without deciding, that the search was neither a lawful protective sweep nor a lawful search incident to arrest, but we conclude nonetheless that the drugs inevitably would have been discovered.

"Under the inevitable discovery doctrine, 'evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means.'" ***State v. Jackson***, 2016 WI 56, ¶47, 369 Wis. 2d 673, 882 N.W.2d 422 (citations omitted). The State has the burden to prove inevitable discovery by a preponderance of the evidence. ***Id.***, ¶¶66, 74.

In ***Jackson*** our supreme court explained that an inevitable discovery analysis requires consideration of three factors that are "important indicia of inevitability" but not "indispensable elements of proof." ***Id.***, ¶66. The factors are:

> (1) [A] reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

Id., ¶60 (citations omitted).

As to the first factor, the prosecution showed through Officer Shipman's testimony that there was a reasonable probability that the drugs in Merriett's vehicle would have been discovered by lawful means but for Shipman's search. As already noted, Merriett was in violation of both registration and window tint laws, and Shipman testified that it was a general police practice to tow vehicles with such violations. In addition, Shipman further testified that it would have been unlawful to operate Merriett's vehicle or to park it on a city street. There was no evidence that the vehicle could have been left parked at the gas station. Based on Shipman's testimony, the circuit court found that the drugs in Merriett's vehicle would have been discovered because the police would have towed the vehicle pursuant to their general policy. This finding is not clearly erroneous.

We note that Merriett does not dispute that a police tow of Merriett's vehicle would have inevitably led to discovery of the drugs inside. Rather, Merriett argues only that a police tow of the vehicle was not inevitable under the police policy. Merriett argues that the State needed to show that the police actually intended to tow the vehicle or initiated steps to tow the vehicle based on their policy. We disagree. The State's evidence here was sufficient to prove by a preponderance of the evidence that the police would have towed the vehicle based on their policy even if they had not discovered drugs upon Shipman's search of the vehicle at the gas station.

Turning to the second factor, Officer Shipman's testimony established that police possessed the leads making discovery inevitable at the time Shipman searched Merriett's vehicle. Prior to that search, the police had already determined that Merriett's vehicle was not lawfully registered and that it had window tinting so dark as to be unlawful.

As to the third and final factor, Merriett argues that there was no evidence that police were actively pursuing an alternative line of investigation. However, as already indicated, our supreme court in ***Jackson*** concluded that an alternative line of investigation is not an "indispensable element[] of proof." ***Id.***, ¶¶60, 66. Even without an alternative line of investigation, "'the government may well be able to establish that the execution of routine police procedure or practice inevitably would have resulted in discovery.'" ***Id.***, ¶62 (citations omitted). Here, the State has established such a routine procedure or practice.

Therefore,

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals