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DISTRICT III

April 20, 2021

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

2019AP1995-CR State of Wisconsin v. Nakia L. Jordan (L. C. No. 2017CF1539)

Before Stark, P.J., Hruz and Seidl, 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).

Nakia Jordan appeals a judgment, entered upon his guilty pleas, convicting him of operating a motor vehicle with a restricted controlled substance in his blood, as a fourth offense, and cocaine possession, as a second and subsequent offense. Jordan argues that the circuit court erred by denying his motion to suppress evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject

Jordan's arguments, and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2019-20).

At a hearing on Jordan's suppression motion, Green Bay police officer Derek Wicklund testified that shortly after 11:00 p.m. on Friday, October 13, 2017, he approached an intersection and observed a car "fishtail[] at the bottom of [a] ramp" and spin its tires on the asphalt. While the road conditions were wet, Wicklund did not see any other driver fishtail around that time. Wicklund believed the driver was failing to maintain control of the vehicle or driving too fast for conditions. Given the time of night, Wicklund initiated a traffic stop on suspicion of driver impairment and to ascertain if the driver had a justifiable reason for the observed driving behavior.

When Wicklund approached the vehicle, he noticed that the driver, identified as Jordan, "was sweating" and "wouldn't look at [him.]" Significantly, Wicklund noticed that Jordan "had a white circular imprint on the outside of his left nostril" that looked similar to someone having dipped their fingertip in flour before dabbing the side of their nose. Wicklund, who at that time had been a police officer for more than fifteen years and a certified drug recognition expert since 2011, believed that the substance on Jordan's nose was cocaine.

Based on his training and experience, Wicklund explained that if someone "was preparing cocaine, cutting it up or preparing it to snort," it is plausible that person would have cocaine on their fingertip. Wicklund further testified that people commonly use cocaine by closing one nostril with their finger in order to "snort cocaine in [the other] nostril," and that action would leave a white imprint on one's nose like the one he observed on Jordan. Wicklund also knew that cocaine is a stimulant, and that people under the influence of cocaine "are jacked up" and "would drive fast." Wicklund added that cocaine "elevates your body temperature, pulse, [and] blood pressure,"

which could cause sweating. Finally, Wicklund noted that cocaine will affect a person's pupils, and drug recognition experts "can determine a lot about what kind of … medication or drugs are in their system just simply by looking at their eyes." Thus, Jordan's driving behavior, sweating, and refusal to look at Wicklund, along with the mark on Jordan's nose, led Wicklund to believe the substance on Jordan's nose was cocaine.

Concerned that sweat would remove the substance from Jordan's nose, or that Jordan would wipe the substance from his nose if it was drawn to his attention, Wicklund asked another officer, Riley Peterson, to use a cocaine-detecting "swipe" to make contact with the substance on Jordan's nose. Although neither officer had received training on using the "Cocaine ID Swipe," directions on the package read: (1) remove swipe from the foil packaging; (2) wipe across surface suspected of cocaine presence; and (3) if surface of swipe turns blue, cocaine is present. The package contained no warnings that the swipe should not contact skin. Wicklund removed the swipe from its packaging with his bare hands and gave it to Peterson.

With the swipe in hand, the officers asked Jordan to exit and walk to the back of his vehicle. Peterson then said: "[Y]ou got something on your nose," and wiped Jordan's nose with the swipe. Jordan appeared "quite shocked" and reacted by wiping his nose with his shirt. Both Wicklund and Peterson acknowledged that at the time they utilized the swipe, Jordan was not free to leave and the officers neither asked for nor received consent to use the swipe. Upon contact with the substance on Jordan's nose, the swipe turned blue, indicating the presence of cocaine. Jordan was then placed under arrest and ultimately charged with the present crimes.

The circuit court denied Jordan's suppression motion concluding that although wiping Jordan's nose constituted a search, it was not an unreasonable search. Jordan moved for

reconsideration arguing that the swipe manufacturer's safety warnings rendered its use unreasonable. The court disagreed and denied the reconsideration motion. Jordan then pleaded guilty to the crimes charged. The court withheld sentence and imposed three years' probation with one year of conditional jail time. This appeal follows.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee that persons shall be free from unreasonable searches and seizures. Whether a police officer's conduct violates the prohibition on unreasonable searches and seizures is a question of law we review without deference to the circuit court. ***State v. Edgeberg***, 188 Wis. 2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994). However, we uphold the circuit court's factual findings as long as they are not clearly erroneous. ***Id.*** at 346.

Certain categories of warrantless searches and seizures have long been recognized as permissible because they are reasonable. ***Fernandez v. California***, 571 U.S. 292, 298 (2014). Jordan focuses on the community-caretaker exception to warrantless searches, arguing it does not apply in this situation. We agree; however, as relevant here, law enforcement may seize evidence of a crime when it is in plain view, ***Payton v. New York***, 445 U.S. 573, 587 (1980), or when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search [or seizure] is objectively reasonable," ***Kentucky v. King***, 563 U.S. 452, 460 (2011) (citation omitted). Peterson's seizure of the substance on Jordan's nose falls into both categories.

Seizure of an object in plain view is reasonable if a law enforcement officer has a prior justification for being in the position from which he or she discovers the object, and if the object seized "'in itself or in itself with facts known to the officer at the time of the seizure … provide[s] probable cause to believe there is a connection between the [object] and criminal activity.'" ***State***

v. Buchanan, 2011 WI 49, ¶23, 334 Wis. 2d 379, 799 N.W.2d 775 (citations omitted). An object is in plain view when it is visible and "obvious at a glance." *See* ***Bies v. State***, 76 Wis. 2d 457, 472-73, 251 N.W.2d 461 (1977). An officer has prior justification for being near a person's car during a lawful traffic stop. *See* ***United States v. Seymour***, 519 F.3d 700, 713-14 (7th Cir. 2008). There is probable cause if, considering the totality of the circumstances, there is a "fair probability" that an object is contraband. ***State v. Sutton***, 2012 WI App 7, ¶10, 338 Wis. 2d 338, 808 N.W.2d 411. "An officer's knowledge, training, and experience are germane to the court's assessment of probable cause." ***State v. Carroll***, 2010 WI 8, ¶28, 322 Wis. 2d 299, 778 N.W.2d 1. Further, an officer's seizing contraband from an individual's person is not unreasonable. *See, e.g.*, ***State v. Buchanan***, 178 Wis. 2d 441, 450, 504 N.W.2d 400 (Ct. App. 1993) (holding that under plain view doctrine, an officer reasonably seized contraband from inside a defendant's waistband).

Here, Wicklund had a reasonable basis to stop Jordan and his experience and observations provided him with probable cause to believe that Jordan had been using cocaine and that the substance on his nose was cocaine. When Wicklund informed Peterson of his belief that the substance was cocaine and asked Peterson to use the swipe, that probable cause was imputed to Peterson. *See* ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853 (recognizing that information sufficient to create probable cause is imputed to other officers through the collective knowledge doctrine). Law enforcement was therefore permitted to seize likely evidence of this crime that was in plain view without offending the Fourth Amendment.

We also conclude that the exigency of the circumstances justified the warrantless search. Exigent circumstances justify seizing property to prevent the destruction of evidence when law enforcement have probable cause to believe there is: (1) evidence of a crime; and (2) a risk that the evidence will be destroyed if time is taken to obtain a warrant. *See* ***State v. Parisi***, 2014 WI

App 129, ¶9, 359 Wis. 2d 255, 857 N.W.2d 472. As noted above, Wicklund had probable cause to believe that the white substance on Jordan's nose was cocaine. It was reasonable for the officers to believe that, if Jordan became aware of the cocaine on his nose, he would attempt to wipe it off or otherwise destroy it, or that Jordan's sweat would remove the substance, before the officer could obtain a warrant. The warrantless search was therefore reasonable given the exigency of the circumstances.

Jordan nevertheless argues that by concluding the search was reasonable, the circuit court has set a dangerous precedent, potentially opening the door for law enforcement to obtain saliva DNA without a warrant. However, Jordan's argument stems from a false premise, as police are not always required to obtain a warrant before taking a DNA sample. *See, e.g.*, ***Maryland v. King***, 569 U.S. 435, 464 (2013) (holding that taking a cheek-swab DNA sample is a legitimate police booking procedure that is reasonable under the Fourth Amendment). We are not persuaded that Jordan's speculative argument renders the nose wipe unreasonable. Jordan also contends that the possibility of "serious physical reaction" to the swipe rendered the search unreasonable. However, Jordan cites no legal authority to support his argument that potential side effects of police equipment can render a search or seizure using that equipment unreasonable. This court need not consider arguments that are unsupported by reference to legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2019-20).

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

Sheila T. Reiff
Clerk of Court of Appeals