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DISTRICT I

August 31, 2021

To:

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Milwaukee County Courthouse
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Eric Michael Muellenbach
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1095-CR State of Wisconsin v. Jeffrey L. Whittley (L.C. # 2018CF3402)

Before Donald, P.J., Dugan and White, 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).

Jeffrey L. Whittley appeals a judgment of conviction entered after he pled guilty to two crimes. The sole issue on appeal is whether the circuit court properly declined to suppress the cocaine that police found when they conducted a strip search of Whittley following his arrest.

Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

Police officers on patrol in Milwaukee observed that a Ford Fusion with illegally tinted windows disregarded two stop signs. The officers conducted a traffic stop. The driver, subsequently identified as Whittley, made furtive movements, and the officers ordered him out of the car. While one officer was conducting a pat-down search of Whittley, a second officer observed marijuana residue inside the car and smelled the odor of burnt marijuana. A search of the car uncovered a digital scale dusted with white powder. One of the officers then conducted a secondary search of Whittley's person and felt a foreign object in Whittley's pants. The officer believed that the object he felt was a plastic bag containing a chunky substance. During this search, Whittley attempted to escape, but officers restrained him and then took him into custody.

Police brought Whittley to the police station and conducted a strip search. During that search, police found 3.64 grams of cocaine in his underwear. The State charged Whittley with possession of cocaine as a second or subsequent narcotics offense and with obstructing an officer, both as a habitual offender.

Whittley sought to suppress the cocaine found during the strip search. As grounds, he alleged that police violated WIS. STAT. § 968.255(2)(d)-(e) by failing to obtain prior written authorization for a strip search and by failing to give him a copy of the report regarding the search. The circuit court conducted an evidentiary hearing and found that the police did not comply with

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the statute. The circuit court determined, however, that suppression is not an available remedy for violating § 968.255. Whittley pled guilty as charged and now appeals.[2]

WISCONSIN STAT. § 968.255 provides, in pertinent part:

> (2) No person may conduct a strip search unless all of the following apply:
>
> ....
>
> (d) A person conducting the search has obtained the prior written permission of the chief, sheriff or law enforcement administrator of the jurisdiction where the person is detained, or his or her designee, unless there is probable cause to believe that the detainee is concealing a weapon.
>
> (e) A person conducting the search prepares a report identifying the person detained, all persons conducting the search, the time, date and place of the search and the written authorization required by par. (d), and provides a copy of the report to the detainee.
>
> ....
>
> (4) A person who intentionally violates this section may be fined not more than $1,000 or imprisoned not more than 90 days or both.
>
> (5) This section does not limit the rights of any person to civil damages or injunctive relief.

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[2] A defendant who pleads guilty normally gives up the right to appeal issues related to alleged nonjurisdictional defects and defenses, including constitutional claims. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. Upon appeal from a final judgment, however, this court may review an order denying a motion to suppress "notwithstanding the fact that the judgment ... was entered upon a plea of guilty[.]" *See* WIS. STAT. § 971.31(10). We observe that in this case, the State filed a preemptive motion to admit the evidence that police found during the strip search. In support of the motion, the State argued that suppression was not the proper remedy for a violation of WIS. STAT. § 968.255. Whittley filed a responsive document titled "brief in support of motion to suppress." The circuit court ruled from the bench, agreeing with the State and stating that "the motion is denied." We are satisfied that, despite a somewhat unusual procedural posture, the circuit court's ruling is reviewable under § 971.31(10). Moreover, the forfeiture rule is one of "administration and does not involve the court's power to address the issues raised." *See* ***Kelty***, 294 Wis. 2d 62, ¶18.

Whittley begins by claiming that the circuit court should have suppressed evidence found during the strip search because police did not comply with WIS. STAT. § 968.255(2)(d)-(e). No dispute exists that police failed to comply with those provisions. Such noncompliance alone, however, does not warrant suppression. *See* ***State v. Minett***, 2014 WI App 40, ¶1, 353 Wis. 2d 484, 846 N.W.2d 831. In ***Minett***, we explained that § 968.255 is a regulatory statute that does not contemplate suppression of evidence. *See* ***Minett***, 353 Wis. 2d 484, ¶10. Rather, the statute reflects a legislative determination that the potential remedies for a violation of § 968.255, are a fine or imprisonment, civil damages, and injunctive relief. *See* ***Minett***, 353 Wis. 2d 484, ¶10. Accordingly, "absent [a] constitutional violation ... suppression [i]s not a remedy" for violations of § 968.255. *See* ***Minett***, 353 Wis. 2d 484, ¶10.

Whittley next claims that the strip search in fact violated his constitutional rights and that the evidence found during the procedure should therefore be suppressed. We review that allegation under a two-step process. *See* ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. "[W]e uphold the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. We then independently evaluate those facts against a constitutional standard to determine whether the search was lawful." ***Id.*** (citation omitted). In this case, the relevant facts are not in dispute. Therefore, as Whittley acknowledges, our role is to "review the facts of this case to determine if they meet the constitutional standard" for a warrantless search.

The United States Constitution and the Wisconsin Constitution permit police to conduct a warrantless search of a person incident to a lawful arrest. *See* ***State v. Payano-Roman***, 2006 WI 47, ¶31, 290 Wis. 2d 380, 714 N.W.2d 548; ***State v. Rome***, 2000 WI App 243, ¶¶10-11, 239 Wis. 2d 491, 620 N.W.2d 225. Whittley does not deny that the police lawfully arrested him.

Accordingly, he must identify some basis for his claim that the search in this case nonetheless ran afoul of the United States or Wisconsin Constitution, notwithstanding the lawfulness of his arrest.

In an effort to show a constitutional violation flowing from the strip search, Whittley first argues:

> The facts of this case do not meet the constitutional standard for searches. WISCONSIN STAT[.] § 968.255 states that "no person may conduct a strip search unless ... a person conducting the search has obtained prior written permission [of] the chief, sheriff, or law enforcement administrator of the jurisdiction...." WIS. STAT. § 968.2[5]5(2)[d]. That did not occur in the present case as the State failed to ever obtain written authorization.

(Emphasis omitted.) This argument merely restates the conceded fact that police did not comply with § 968.255. That fact does not reveal a constitutional violation.

Second, Whittley argues that failure to obtain the written authorization required by WIS. STAT. § 968.255(2)(d) "is akin to the requirement that a search warrant must be signed," and that"[j]ust as an unsigned search warrant is not a warrant" sufficient to permit a search under the Fourth Amendment, so too "the failure to have signed authority of any kind [pursuant to § 968.255(2)(d)] violates the Constitution." Whittley bases this argument on a dissenting opinion in ***State v. Kerr***, 2018 WI 87, ¶89, 383 Wis. 2d 306, 913 N.W.2d 787 (R. Bradley, J., dissenting). A dissent, however, "is what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Absent governing authority that supports a proposition, we will reject it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We follow that rule here.

Whittley last argues that the testimony at the suppression hearing revealed that Milwaukee police always disregard the requirements of WIS. STAT. § 968.255, and thus the statutory violations in this case reflect "systemic police misconduct." Therefore, he contends, the evidence that police

found during the strip search should be suppressed because the purpose of suppressing evidence seized in violation of the Fourth Amendment "is to deter police misconduct." *See* ***Kerr***, 383 Wis. 2d 306, ¶21. We reject this analysis. While Whittley shows that the purpose of the exclusionary rule is to deter police misconduct, *see* ***id.***, he does not show that all alleged police misconduct should be curbed by suppressing evidence. To the contrary, ***Minett*** holds that where law enforcement errs by violating § 968.255, the remedy does not include suppression absent an accompanying constitutional violation. *See* ***Minett***, 353 Wis. 2d 484, ¶10. We are bound by the holding in ***Minett***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Accordingly, we affirm.

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