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

October 12, 2021

To:

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Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

John D. Flynn
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Brian Patrick Mullins
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Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2019AP729-CR State of Wisconsin v. Miles J. Olson (L.C. # 2018CF2377)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Miles J. Olson appeals a judgment convicting him of one count of possession of cocaine with intent to deliver and one count of operating a vehicle while intoxicated, as a fifth offense. Olson argues that the police violated the Fourth Amendment when they searched his car after his arrest. We conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2019-20).[1] Upon review, we affirm.

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

"A search within the meaning of the Fourth Amendment occurs when the police infringe on an expectation of privacy that society considers reasonable." ***State v. Davis***, 2011 WI App 74, ¶8, 333 Wis. 2d 490, 798 N.W.2d 902. Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967) (footnote omitted). One such exception is "a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" ***Arizona v. Gant***, 556 U.S. 332, 343 (2009) (citation omitted); ***State v. Coffee***, 2020 WI 53, ¶48, 391 Wis. 2d 831, 943 N.W.2d 845.

At the suppression hearing, Police Officer John Kleinfeldt testified to the following. He responded to a call at 4:00 a.m. that a man, who was later identified as Olson, was passed out in a car. When Officer Kleinfeldt arrived at the scene, he found Olson asleep in the driver's seat of a car. The driver's side door was open and the car was running. Olson's legs were outside the car and his upper body was slumped over the center console. Officer Kleinfeldt roused Olson, who initially did not respond but then jolted awake. Officer Kleinfeldt said that Olson had an odor of alcohol emanating from him, his eyes were unusually dilated, and his movements were exaggerated. Officer Kleinfeldt said that he waited for Officer Jeffrey Dufek to arrive to perform field sobriety tests because Officer Dufek is a drug recognition expert and he suspected that Olson may be under the influence of a controlled substance in addition to alcohol.

Officer Dufek testified that when he arrived at the scene, he noticed that Olson smelled of alcohol and his pupils were dilated, which can indicate that a person has taken a stimulant. Officer Dufek said that he administered field sobriety tests. Olson performed poorly on the tests. Officer Dufek arrested Olson for operating while intoxicated and placed him in the back of a

squad car. The police then searched Olson's car and found cocaine and drug paraphernalia in the back seat.

As a preliminary matter, we note that there was some confusion at the suppression hearing about the correct legal standard to be applied to assess the constitutionality of this search.[2] The correct standard is whether it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" ***Gant***, 556 U.S. at 343 (citation omitted); ***Coffee***, 391 Wis. 2d 831, ¶¶48, 51. However, any error is of no import to this appeal because we independently decide the legal question whether the search violated the constitution based on the facts found by the circuit court. *See* ***Coffee***, 391 Wis. 2d 831, ¶20.

Turning to Olson's argument, he contends that the police did not have a reasonable suspicion to search his vehicle for evidence related to the offense for which he was arrested, operating a vehicle while intoxicated. He contends that the police were permitted to search only for alcohol-related evidence because they believed that he was under the influence of alcohol when they arrested him.

Olson's argument is unavailing. First, as a factual matter, the police officers both testified that they believed that Olson may be under the influence of alcohol, which they could

[2] The prosecutor stated:

> Your Honor, I would respectfully disagree with [defense] counsel's interpretation …. I think he overstates the necessary modicum of information that the officers need before they can go back into the vehicle. It isn't a reasonable suspicion standard. The standard is that there's a reasonable belief that relevant evidence to the crime of arrest might be found in a vehicle. That's a lesser standard.

The circuit court agreed with the prosecutor.

smell, as well as some other intoxicating substance based on his behavior and his unusually dilated eyes. The circuit court found that the police suspected that Olson was intoxicated but that they were not sure what the sources of the intoxication were. Second, the crime for which Olson was arrested, WIS. STAT. § 346.63(1)(a), prohibits operating under the influence of an intoxicant, including alcohol or controlled substances, or a combination thereof. The police had a reasonable suspicion that Olson's car might contain evidence that he operated his car while under either alcohol or drugs, or a combination of the two, in accord with the crime for which Olson was arrested. Therefore, the police search of Olson's car for alcohol or drugs incident to his arrest was constitutional. *See* ***Gant***, 556 U.S. at 343.[3]

Olson next argues that the police did not have authority to search his car pursuant to the community caretaker doctrine. The State did not argue that the police were authorized to search Olson's vehicle pursuant to the community caretaker doctrine but the circuit court determined that the search was justified under the community caretaker exception to the search warrant requirement. On appeal, the State indicates that it does not rely on the officers' community caretaker role as justification for the search. Because we have concluded that the search was proper incident to Olson's arrest, we do not consider this issue further.

[3] Olson argues that the search here was improper based on ***State v. Hinderman***, No. 2014AP1787-CR, unpublished slip op. (WI App Feb. 12, 2015). ***Hinderman*** is distinguishable on the facts. More importantly, the Wisconsin Supreme Court pointed out that ***Hinderman*** applied the wrong legal standard. *See* ***State v. Coffee***, 2020 WI 53, ¶¶62-63, 391 Wis. 2d 831, 943 N.W.2d 845 (stating that the correct legal standard to be applied when evaluating a search of a vehicle incident to arrest is whether it is reasonable to believe that evidence "might be found" in the vehicle, not whether evidence "would be found in the vehicle.").

Upon the foregoing,

IT IS ORDERED that the judgment of the circuit court 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