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DISTRICT I

March 28, 2023

To:

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Circuit Court Judge
Electronic Notice

John D. Flynn
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Hon. Joseph R. Wall
Circuit Court Judge
Electronic Notice

Michael C. Sanders
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2021AP458-CR

State of Wisconsin v. Justin Jackson (L.C. # 2016CF5564)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Justin Jackson appeals his judgment of conviction entered after he pled guilty to being a felon in possession of a firearm and threatening a law enforcement officer. Jackson also appeals an order denying his motion to suppress the evidence of the loaded firearm that was found in his vehicle during a traffic stop. That motion, which was heard by the circuit court upon remand by this court, was denied after the circuit court determined that there was reasonable suspicion for the search of Jackson's 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. § 809.21(1) (2021-22).¹ We affirm.

In December 2016, an officer from the West Allis Police Department conducted a traffic stop of Jackson’s vehicle at approximately 11:30 p.m., after he observed the vehicle going ten miles over the speed limit in a primarily residential area. After the vehicle had pulled over, the officer observed Jackson “making directed motions towards the passenger side and the center of the car away from where he was seated in a furtive way as though concealing something inside the vehicle.”

The officer considered these movements to be “distinctly different” from the “common” manner in which people reach for identification or paperwork during a traffic stop, and therefore drew his gun and ordered Jackson out of the vehicle. The officer confirmed Jackson’s identity and found that he was on extended supervision; he further discovered Jackson also had an active warrant for his arrest.² The officer therefore secured Jackson in the back of his squad car, and commenced a search of Jackson’s vehicle. During that search, the officer discovered a loaded semi-automatic pistol in the glove box.

Jackson was charged with being a felon in possession of a firearm as well as threatening a law enforcement officer, after he became very aggressive during the search of his vehicle, kicking the windows of the squad and threatening to kill the officer. Jackson entered into a plea agreement under which he pled guilty to both charges. He was sentenced to four and one-half

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² That active warrant was determined to be invalid shortly after Jackson was arrested; the warrant was for unpaid court costs, and was not an arrest warrant.

years of imprisonment for each charge, concurrent to each other but consecutive to his previous case where his extended supervision was revoked.

Jackson filed a postconviction motion alleging that his trial counsel was ineffective for failing to file a motion to suppress the evidence of the pistol that was found in his vehicle. After holding a *Machner*³ hearing, the trial court found that trial counsel had properly analyzed the law in deciding not to file a suppression motion, and that a motion would not have been successful. The court therefore found that counsel was not ineffective for not filing the motion.

Jackson appealed, and this court reversed. See *State v. Jackson*, No. 2018AP2450-CR, unpublished slip op. (WI App Sept. 9, 2020). We concluded that trial counsel’s testimony at the *Machner* hearing did not demonstrate that counsel had provided “correct advice” to Jackson regarding the law relating to the basis for the search, and that this constituted deficient performance. *Jackson*, No. 2018AP2450-CR, ¶20. Furthermore, we observed that the State had “effectively concede[d]” that Jackson was prejudiced if trial counsel had been deficient in her analysis. *Id.*, ¶33. We therefore remanded the matter for a suppression hearing. *Id.*, ¶34.

At the suppression hearing, the arresting officer was the sole witness, who the circuit court found to be “very credible” with “substantial” background and experience.⁴ The court observed that although Jackson’s movements toward the passenger side of the vehicle after being

³ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁴ The Honorable Dennis R. Cimpl, who we refer to as the trial court, took Jackson’s plea, presided over the *Machner* hearing, and entered the order denying Jackson’s postconviction motion. On remand, the suppression hearing was presided over by the Honorable Joseph R. Wall, who we refer to as the circuit court.

pulled over could be construed as searching for identification documents, when Jackson was ordered by the officer to show his hands out the vehicle window, there was nothing in them.

Primarily, however, the circuit court focused on the fact that at the time the officer conducted the search of Jackson’s vehicle, he had established that Jackson was on extended supervision, and thus was subject to a lower threshold for searches, as set forth in WIS. STAT. § 302.113(7r).⁵ Under that statute, the requirement for a search is a reasonable suspicion—as opposed to probable cause—that Jackson was “committing, [was] about to commit, or [had] committed a crime or a violation of a condition of release to extended supervision.” *See id.* The court ultimately found that the officer had reasonable suspicion for the search, and denied the suppression motion. Jackson appeals.

The review of a circuit court’s decision on a motion to suppress presents a mixed question of fact and law. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will not reverse the trial court’s findings of fact unless they are clearly erroneous; however, we review *de novo* the application of constitutional principles to those facts. *Id.*

On appeal, Jackson renews his claim that the officer did not have reasonable suspicion to conduct the search of his vehicle. Jackson focuses his argument on the circuit court’s findings relating to the officer’s testimony regarding Jackson’s movements inside his vehicle after being pulled over. In support, he cites *State v. Johnson*, 2007 WI 32, ¶¶3, 36, 299 Wis. 2d 675, 729 N.W.2d 182, where our supreme court concluded that a “furtive movement” by the defendant, as

⁵ This is referred to as an “Act 79” search, based on the act that created WIS. STAT. § 302.113(7r). *See State v. Anderson*, 2019 WI 97, ¶¶22-23, 389 Wis. 2d 106, 935 N.W.2d 285.

if reaching under the front seat, after being pulled over was not sufficient to support a finding of reasonable suspicion for the search of his vehicle. He also cites *State v. Gordon*, 2014 WI App 44, ¶18, 353 Wis. 2d 468, 846 N.W.2d 483, where this court determined that a person walking in a “high crime area” and “patting the outside of their clothing” after seeing a police car are not sufficient facts to support a finding of reasonable suspicion. Jackson contends that the officer’s reliance on his “furtive movements” after being pulled over is similarly insufficient to support a finding of reasonable suspicion.

However, here there were additional factors involved in the decision to search Jackson’s vehicle. First, the movements the officer observed Jackson making were sufficiently “alarm[ing]” that he pulled his gun and ordered Jackson out of the vehicle for safety reasons. He also noted that Jackson had nothing in his hands when he was ordered out of the vehicle; if he had been reaching for identification or other paperwork, there is a reasonable expectation that he would still be holding those items. The officer further testified that Jackson was hesitant to exit the vehicle, which can indicate that there is contraband in the vehicle. The officer stated that Jackson had “resistive tension in his body” as he was escorted to the police squad, and then displayed very aggressive behavior when the search was commenced.

Moreover, the search of Jackson’s vehicle was not commenced until after the officer discovered that Jackson was on extended supervision. As the circuit court recognized, under WIS. STAT. § 302.113(7r) an officer may perform a search under the lower standard of reasonable suspicion, as opposed to probable cause, if the person being searched is on extended supervision. See *State v. Anderson*, 2019 WI 97, ¶¶22-23, 389 Wis. 2d 106, 935 N.W.2d 285.

Reasonable suspicion is “a fairly low standard to meet,” and is described as a “commonsense nontechnical conception ... that deal[s] with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Id.*, ¶33 (citations and some quotation marks omitted). “A determination of reasonable suspicion is made based on the totality of the circumstances.” *Id.* All of the circumstances surrounding this stop contributed to the officer’s decision to search Jackson’s vehicle, and the totality of those circumstances support the conclusion that there was reasonable suspicion that Jackson had committed a crime or a violation of his extended supervision. *See id.* Therefore, the search of Jackson’s vehicle was justified. *See* WIS. STAT. § 302.113(7r).

Accordingly, we conclude that the circuit court properly denied Jackson’s suppression motion. *See State v. Martin*, 2012 WI 96, ¶28, 343 Wis. 2d 278, 816 N.W.2d 270. Consequently, Jackson’s claim that his trial counsel was ineffective for failing to file that motion necessarily fails. *See State v. Berggren*, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (“an attorney is not ineffective for not making a motion that would have been denied”). We therefore affirm.

IT IS ORDERED that the judgment and order are 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