STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP1430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTWAN D. HOPSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE TERENCE T. BOURKE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. This case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[1]

ARGUMENT

THE SEARCH OF HOPSON'S PERSON WAS A LAWFUL SEARCH INCIDENT TO ARREST, AND THEREFORE, THE COURT PROPERLY DENIED HOPSON'S MOTION TO SUPPRESS.

Hopson argues that the circuit court erred in denying his motion to suppress evidence discarded during his flight from officers. Hopson alleges that the baggie of cocaine that he discarded during his flight should be suppressed because it was a product of an illegal search (*see generally* Hopson's Br.). Upon review, this Court should conclude that the search of Hopson was a lawful search incident to arrest,[2] and that during that search Hopson fled and abandoned the baggie of cocaine. Therefore, this Court should conclude that the circuit court reached the right result in denying Hopson's motion to suppress.

A. The standard of review.

In review of a denial of a motion to suppress, findings of historical fact are upheld unless found to be clearly erroneous. Wis. Stat. § 805.17(2); *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277 (citing *State v. Vorburger*, 2002 WI 105, ¶ 32, 255

[1] All citations to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] This Court has the authority to affirm the denial of Hopson's motion to suppress on other grounds. *See State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 ("On appeal, we may affirm on different grounds than those relied on by the trial court.").

Wis. 2d 537, 648 N.W.2d 829). The application of constitutional principles to those facts is reviewed *de novo*. *Id.*

B. Officer Saeger had probable cause to arrest Hopson at the time of the search, and therefore, the search was a lawful search incident to arrest.

Hopson argues that the search of his person was not a search incident to arrest because he would not have believed that he was under arrest at the time of the search, and therefore, was not under arrest at that time (*see* Hopson's brief at 5-6). Whether Hopson was actually under arrest at the time of the search is the wrong inquiry. When the fruits of the search are not necessary to support the arrest, a search incident to arrest may precede formal arrest. *Sykes*, 279 Wis. 2d 742, ¶ 16. Because a search incident to arrest may be performed immediately prior to a formal arrest, it does not matter if the suspect was, or believed that he was, under arrest at the time of the search. The correct inquiry is whether Officer Saeger had probable cause to arrest Hopson for a crime before the search occurred.

Probable cause exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660; *Dane County v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The probable cause standard is an "objective" standard, independent of an officer's subjective assessment. *Kutz*, 267 Wis. 2d 531, ¶ 12.

> Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime. There must be more than a possibility or suspicion that defendant committed an offense, but the evidence

> need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.

State v. Mitchell, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). Probable cause to arrest "is to be judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). Like reasonable suspicion, "[w]hen a police officer is confronted with two reasonable competing inferences . . . the officer is entitled to rely on the reasonable inference justifying arrest." *Id.*

Here, the totality of the circumstances supports a finding of probable cause to arrest. Hopson was the passenger of a vehicle that Officer Schnabel stopped because the vehicle had suspended plates (1:3-4; 215:5). The stop occurred in a known drug trafficking area (215:21). When Officer Schnabel spoke with the driver of the vehicle, the driver presented him with an expired license (215:7). After Officer Schnabel identified Hopson, the officer returned to the squad car and learned that the driver had a suspended license, and that Hopson had a warrant for his arrest in South Carolina (1:4; 215:8-11). The warrant for Hopson's arrest was for possession with intent to deliver marijuana (215:11). It contained a warning that Hopson was known for "violent tendencies" (215:11).

After Officer Schnabel learned this information, he asked Officer Yang and Officer Saeger to assist with the stop (1:4; 215:11). Officer Schnabel was preparing a citation for the driver when Officer Saeger arrived with the K-9 and when Officer Yang arrived (215:12-13). Officer Schnabel asked the driver to exit the vehicle and Officer Yang asked Hopson to exit the vehicle (215:15; 216:10, 18-19). With Hopson's consent, Officer Yang patted-down Hopson for weapons but found none (216:6, 11-12).

The K-9, Bud, did a sniff of the exterior of the vehicle (216:19). He indicated, meaning there was an odor of a controlled substance coming from the vehicle (216:19). Bud then did an interior sniff, and indicated at the center console area (216:19). Officer Saeger then found marijuana "shake"[3] in the ashtray, on the floor of the front passenger area, and behind the front passenger seat (216:20). Hopson had occupied the front passenger seat before Officer Yang asked him to exit the vehicle (216:20). Once the search of the vehicle was completed, Officer Saeger began to search Hopson "like a routine search incident to arrest," but she could not complete the search because Hopson fled on foot (216:20-21).

Officer Saeger had probable cause to believe that Hopson had possessed tetrahydrocannabinol before she searched his person, and therefore, the search was a lawful search incident to arrest. First, while the amount of marijuana found in the vehicle was minimal, Wisconsin courts have never held that a particular amount of tetrahydrocannabinol was required to establish probable cause for possession. For example, "[i]n this state, no minimum quantity of a controlled substance is necessary to sustain a conviction for possession." *See State v. Poellinger*, 153 Wis. 2d 493, 508, 451 N.W.2d 752 (1990) (citing *Peasley v. State*, 83 Wis. 2d 224, 231, 265 N.W.2d 506 (1978)). Because proof beyond a reasonable doubt can be supported by residue of a controlled substance, the same must hold true for probable cause to arrest. Similarly, an arrest for suspicion of possession of a controlled substance can be supported by odor alone. *See State v. Secrist*, 224 Wis. 2d 201, 216-18, 589 N.W.2d 387 (1999). The *Secrist* court concluded that it is "common sense" that "when an officer smells the odor of a controlled substance that a crime has probably been committed." *Id.* at 218. Likewise, when an officer finds physical evidence of a controlled substance, no matter

[3] Marijuana "shake" is small, discarded pieces of marijuana (215:18; 216:42).

how minimal, it is common sense that a crime has probably been committed.

In addition to the physical evidence discovered in the vehicle, Hopson was stopped in an area known for drug trafficking. The officers also knew that Hopson had an outstanding warrant in South Carolina for possession with intent to deliver marijuana (215:11). Therefore, there was reason to believe that the marijuana shake found in the vehicle, in the immediate area of the seat in which Hopson was previously sitting, was connected specifically to Hopson. Under the totality of the circumstances, a reasonable officer would believe that Hopson probably committed a crime.

As Officer Saeger stated at the suppression hearing: "There's probable cause to arrest [Hopson] for drugs in the vehicle. [He was] not free to go." (216:30). Because there was probable cause to arrest Hopson, it was lawful for Officer Saeger to perform a search prior to Hopson's formal arrest.[4] *Sykes*, 279 Wis. 2d 742, ¶ 26 (citing *State v. Mata*, 230 Wis. 2d 567, 574, 602 N.W.2d 158 (Ct. App. 1999); *State v. Kiekhefer*, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997); *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980); *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

C. Hopson abandoned the baggie of cocaine during his flight, and therefore, the seizure of the cocaine was lawful.

Suppression of the cocaine is not warranted because Hopson abandoned the cocaine as he fled from the officers. If a search incident to arrest is not completed and a suspect flees, discarding evidence during that flight, the evidence is deemed abandoned and beyond the

[4] The arrest for a different crime following the recovery of evidence discarded as a result of a search incident to arrest will not negate the probable cause to arrest that existed prior to the search. *See Sykes*, 279 Wis. 2d 742, ¶ 22.

protections of the Fourth Amendment. *See, e.g.*, 1 Wayne R. LaFave, *Search and Seizure*, § 2.6(b) at 872, 875 (5th ed. 2012) (If incriminating objects are discarded during pursuit by an officer, the object is held to be abandoned, and the object is beyond the protections of the Fourth Amendment.).

Here, the lawful search of Hopson began on the sidewalk (216:20). Before Officer Saeger could complete the search, and right as Officer Saeger was about to search Hopson's shoes, Hopson fled on foot (216:21-22; 29-30). Both Officer Saeger and Officer Yang took off in pursuit (216:21). When Officer Yang caught up to Hopson, Hopson was crouched near the ground and had removed both of his shoes (216:8-9). After the officers apprehended Hopson, Officer Saeger returned to her squad car to retrieve Bud to search the area for drug evidence (216:22). When she returned with Bud, Officer Saeger found a clear plastic baggie containing a white substance that was determined to be cocaine (216:22, 33).

When an individual tries to dispose of incriminating objects during pursuit by an officer, the suspect has abandoned the object. LaFave, *Search and Seizure*, § 2.6(b) at 875. Hopson abandoned the baggie of cocaine and the officers could lawfully recover it. *See, e.g., Molina v. State*, 53 Wis. 2d 662, 669, 193 N.W.2d 874 (1972) (There is no search or seizure when officers recover abandoned evidence because when evidence is disposed of during flight, there is an "affirmative act of divesting control, possession, and ownership."). As addressed above, there was no illegal police activity that precipitated Hopson's flight, and therefore, the officers could lawfully seize the baggie abandoned by Hopson as he fled.[5]

[5] It is only when "a person has disposed of property in response to an illegal seizure or search by police" that courts have held the abandoned property inadmissible. LaFave, *Search and Seizure*, § 2.6(b) at 888-89.

CONCLUSION

For these reasons, the State respectfully asks this Court to affirm the judgment of conviction and order denying suppression.

Dated this 2nd day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,866 words.

Dated this 2nd day of December, 2014.

_____
Tiffany M. Winter
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of December, 2014.

_____
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