RECEIVED
07-15-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2015AP291-CR

DANIEL TAWAN SMITH,

Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE DENIAL OF A PRETRIAL MOTION TO SUPPRESS EVIDENCE AND JUDGMENT OF CONVICTION THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE JAMES P. DALEY, PRESIDING

David O'Leary
Rock County District Attorney

Gerald A. Urbik
Assistant District Attorney
State Bar No. 1019578
jerry.urbik@da.wi.gov
Attorneys for Plaintiff-Respondent

Rock County District Attorney's Office
51 S. Main Street
Janesville, WI 53545
(608)757-5615

TABLE OF CONTENTS

CASES CITED

STATEMENT OF THE ISSUES

1. Was Smith originally detained upon reasonable suspicion that he had committed a crime and did his subsequent admission to possessing marijuana establish probable cause to arrest him and reasonable suspicion to search his vehicle?

   Not answered by trial court.

2. Assuming the defendant was immediately placed under arrest after his vehicle was stopped, was there probable cause to arrest him?

   Trial court answered: Yes.

3. Assuming there was probable cause to arrest Smith, was there reasonable suspicion to search his vehicle?

   Not answered by trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument as it believes this Court may resolve this case by applying well-established legal principles to the facts presented. The State agrees with the appellant that publication is not appropriate as this is a misdemeanor appeal.

STATEMENT OF THE CASE

As the respondent, the State exercises its option not to present a full statement of the case pursuant to Wis. Stat. § 809.109(3)(a)2. Instead, the State will present additional facts, if necessary, in the argument portion of its brief.

ARUGMENT

I. OFFICER MACKEY HAD REASONABLE SUSPICION TO DETAIN SMITH AT THE TIME OF THE TRAFFIC STOP AND SMITH'S ADMISSION TO POSSESSING MARIJUANA PROVIDED MACKEY WITH PROBABLE CAUSE TO ARREST SMITH AND RESONABLE SUSPICION TO SEARCH HIS VEHICLE.

At the hearing on Smith's motion to suppress, Beloit Police Officer Patrick Mackey testified that, after he observed Smith's vehicle leave Smith's residence, Mackey stopped the vehicle, identified Smith as the driver, advised him there was a search warrant for his residence and detained him in handcuffs (29:7). Notwithstanding Mackey's testimony that his intent was only to detain Smith prior to the execution of the search warrant, Smith argues that he was actually arrested as a "reasonable person in Smith's situation would have felt 'in custody' from the moment he was removed from the vehicle." (Appellant's Brief, p. 12). The Wisconsin Supreme Court has held, however, that handcuffing a suspect during the execution of a search warrant does not automatically establish an arrest has occurred. *State v. Vorburger*, 2002 WI 105, ¶64, 255 Wis.2d 537, 648 N.W. 2d 829 (cites omitted). See also *State v. Marten-Hoye*, 2008 WI App 19, ¶ 18, 307 Wis. 2d 671, 746 N.W.2d 498.

In *Vorburger*, the co-defendant in the case (Becker) was stopped as she attempted to enter a motel room, handcuffed, patted down, advised she was being detained for investigative purposes and not free to leave, and given *Miranda* warnings approximately 70 minutes later. *Vorburger* at ¶¶ 15-22. Despite these facts, the Court held that Becker had not been arrested up to that point. In doing so, the Court noted a police officer "can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even

if the officer lacks probable cause." *Id*. at ¶74 (quoting *Terry v. Ohio*, 392 US 1, 30 (1968); and *United States v. Sokolow*, 490 US 1, 70 (1990)).

Applying *Vorburger* to the present case, this Court should conclude that Smith was not under arrest when he was handcuffed by Mackey. As in *Vorburger*, Smith was detained prior to the execution of a search warrant and never told he was under arrest. The fact Mackey told Smith he was being detained while the search warrant for his residence was being executed certainly does not establish that a reasonable person in Smith's position "would consider himself or herself to be 'in custody,' given the degree of restraint under the circumstances." *Marten-Hoye* at ¶14 (quoting *State v. Swanson*, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991) (cites omitted), abrogated on other grounds by *State v. Sykes*, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277. See also *State v. Quartana*, 213 Wis. 2d 440, 449-51, 570 N.W.2d 618 (Ct. App. 1997) (applying a "totality of the circumstances" test to determine if a reasonable person would believe he or she was under arrest).

In his brief, Smith concedes that under *Sykes*, "an officer's subjective intent is not determinative as to whether or not a person is under arrest," but then proceeds to argue that "it is clear that Officer Mackey intended to arrest Mr. Smith." (Appellant's Brief, p.12). Not only is Smith's assertion that Mackey intended to arrest him irrelevant, it is also inaccurate. While Mackey did testify he believed that he had probable cause to arrest Smith (29:14), he never stated he intended to do so prior to Smith's admission he had marijuana on his person. In fact, Mackey repeatedly testified he only intended to detain Smith while the search warrant was being executed. (29:7, 10, 12, and 13). Again, even assuming Mackey did have the subjective intent to arrest Smith after he stopped Smith's vehicle, this would be irrelevant as Mackey never told Smith he was under arrest. See *Berkemer v. McCarty*, 468 US 420, 442 (1984) ("A policemen's unarticulated plan has no bearing on the question whether a suspect was 'in

custody' at a particular time."). As stated previously, in *Vorburger*, the co-defendant was detained for approximately 70 minutes under circumstances very similar to the present case yet the Wisconsin Supreme Court found that no arrest had taken place up until that time. In this case, Smith volunteered he had marijuana on his possession shortly after the traffic stop. This Court should therefore reject Smith's argument that he was under arrest prior to his admission to possessing marijuana.

Smith has apparently abandoned his argument on appeal that there was no reasonable suspicion to stop his vehicle, choosing instead to rely solely on the argument that he was immediately placed under arrest after the traffic stop. Even if the Court determines Smith has not abandoned his claim that there was no reasonable suspicion to stop his vehicle and detain him, the record clearly supports such a finding. As the record shows, prior to stopping Smith's vehicle, Mackey had a search warrant for Smith's residence. In Mackey's affidavit in support of the search warrant, Mackey stated that a reliable confidential informant had told him Smith was selling marijuana and cocaine from his residence and, shortly before applying for the search warrant, Mackey located marijuana stems and "roach cigarettes" in Smith's garbage. (13:4-5). Given this information, Mackey had, at the very least, reasonable suspicion to stop Smith's vehicle and detain him pending the execution of the search warrant. See *State v. Guzy*, 139 Wis.2d 663, 675, 407 N.W.2d 548 (1987).

In *Guzy*, The Wisconsin Supreme Court held that "certain investigative stops, prompted by an officer's suspicion that the occupants have committed a crime, may in certain circumstances be constitutionally permissible, even though the officer lacks probable cause to arrest." *Guzy*, 139 Wis. 2d at 675 (cite omitted). See also *Bailey v. United States*, 133 S.Ct. 1031 (2013). In *Bailey*, the United States Supreme Court held that the police could only detain a suspect during the execution of his or her residence if the suspect was detained within the immediately vicinity of the residence.

Bailey at 1042-43. The Court went on to state, however, that the detention of the suspect could otherwise be justified as "a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause." *Id.* at 1042. This is exactly what occurred in this case.

Since Mackey clearly had reasonable suspicion to question and briefly detain Smith, Smith's volunteered statement to Mackey that he had marijuana in his pocket established probable cause to arrest him and search him for controlled substances. Additionally, once Mackey recovered the marijuana from Smith's pocket, Mackey had reasonable suspicion to search Smith's vehicle for more contraband. See *Arizona v. Gant*, 556 US 332, 351, 129 S.Ct. 1710 (2009) (Police may search a vehicle incident to a recent occupants arrest if "it is reasonable to believe the vehicle contains evidence of the arrest."), and *State v. Smiter*, 2011 WI App 15, ¶13, 331 Wis. 2d 431, 793 N.W.2d 920 (Noting that the United States Supreme Court "concluded in *Gant* that it was reasonable for police officers to believe that further contraband or similar evidence relevant to the drug crimes for which the defendants were arrested might be found in the defendants' vehicles.").

In his brief, Smith cites Mackey's police report in a possible attempt to argue that Mackey searched him before Smith admitted to having the marijuana. (Appellant's Brief, p.12). Mackey's testimony at the motion hearing, however, was unambiguous on this point:

Q. (ADA Urbik) Just in terms of the timing, did the defendant indicate he had a little bit of marijuana on him before or after you started searching?

A. (Officer Mackey) When we got him out of the vehicle to detain him in handcuffs he uttered that he had a little bit of marijuana in his pocket.

Q. (ADA Urbik) So that was before the search?

A. (Officer Mackey) Yes. (29:8)

Although Smith could have tried to impeach Mackey's testimony on cross-examination by using Mackey's police report, Smith failed to do so. Since Mackey was not given the opportunity to explain any alleged discrepancy between his testimony and his police report and Smith failed to address the State's argument at the motion hearing that his spontaneous admission to possessing marijuana provided probable cause to arrest and search him, the defendant has waived any potential claim that his statement was unlawfully obtained. *State v. Caban*, 210 Wis.2d 597, 605, 563 N.W.2d 501 (1997) ("[W]hen a party seeks review of an issue that it had failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised.").

II. EVEN ASSUMING THAT SMITH WAS IMMEDIATELY PLACED UNDER ARREST AFTER HIS VEHICLE WAS STOPPED, THERE WAS ALREADY PROBABLE CAUSE TO ARREST HIM.

While it is the State's position that Smith was only detained after Mackey stopped his vehicle, the record establishes there was probable cause to arrest him for possession of THC in any event. Probable cause to arrest "is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe the defendant probably committed or was committing a crime." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) (cites omitted). Although there "must be more than a possibility or suspicion that the defendant committed an offense…the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *Secrist*, 224 Wis. 2d at 212 (citing *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992)).

In *Secrist*, the Wisconsin Supreme Court held that the police had probable cause to arrest the defendant for possession of marijuana after an officer detected the odor of marijuana coming from the defendant's vehicle. *Secrist,* 224 Wis.2d at 217-19. In doing so, the Court stated that if "under the totality of the circumstances, a trained and experienced police officer identifies an unmistakable odor of a controlled substance and is able to link that odor to a specific person or persons, the odor of the controlled substance will provide probable cause to arrest." *Id*. at 218 (underline added). Given the fact that Mackey located actual marijuana in the same trash bag as indicia of occupancy for Smith, this fact alone is sufficient to establish there was probable cause to arrest him for possession of marijuana under *Secrist*. Although Smith has argued that the discovery of indicia of occupancy for another person in the same trash bag precludes a finding that Mackey had probable cause to arrest Smith, the language in *Secrist* (a case cited by Smith himself) clearly refutes this argument. See also *Mitchell,* 167 Wis. 2d at 684. (Officer had probable cause to arrest defendant for possession of marijuana after smelling marijuana and seeing smoke inside defendant's car; fact that there was another person in the vehicle was not fatal to a finding of probable cause).

Even if this Court were to find that the evidence found in the defendant's trash did not in itself establish probable cause to arrest Smith, when combined with the other facts contained in Mackey's search warrant affidavit, there clearly was more than an ample basis for the circuit court to find that Mackey had probable cause to arrest Smith at the time of the traffic stop.[1] As stated in paragraph 4 of Mackey's affidavit, within 72 hours of applying for the search warrant for Smith's residence, Mackey "received information from a reliable confidential informant that Daniel Smith was selling

[1] The State agrees with Smith that paragraph 3 of Mackey's affidavit concerning his receipt of four separate pieces of intelligence that Smith was selling controlled substances adds little if anything to the probable cause determination. The State is therefore not asking the Court to take this information into account when reaching its decision.

marijuana and cocaine from his address along the 1200 block of Bluff Street in the City of Beloit." (13:4-5). Smith asserts, however, that Mackey did not indicate why the informant was reliable and that the "informant's statement provides virtually no information with which to assess the content." (Appellant's Brief, p.16). The Wisconsin Supreme Court, however, has previously rejected a similar argument. See *State v. Robinson*, 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463.

In *Robinson*, an anonymous citizen reported the defendant was selling marijuana out of his apartment and provided the police with the defendant's cell phone number. *Robinson* at ¶4. Milwaukee police officers subsequently went to the address provided by the citizen, confirmed that the cell phone number belonged to a phone that was presently inside the defendant's apartment and located marijuana in the residence after forcing entry. *Id*. at ¶¶8-11. The Court held that the warrantless entry by the police was justified based on probable cause and exigent circumstances. *Id*. at ¶23. In so holding, the Court noted the police had "corroborated three of the four details relayed by the anonymous informant. *Id*. at ¶28. Although the informant "failed to explain how he came to know of the inside information, the specificity of his information and the fact he personally walked into the police station supported his credibility." *Id.* As a result, the "officers corroboration of innocent, although significant, details of the informant's tip lent reliability to the informant's allegation that Robinson was selling marijuana out of his apartment." *Id.* at ¶29 (citing *State v. Williams*, 2001 WI 21, ¶40, 241 Wis.2d 631, 623 N.W.2d 106).

Applying *Robinson* to the present case, this Court should conclude the informant's information when combined with the evidence discovered in the defendant's trash was more than sufficient to establish probable cause to arrest the defendant. First, unlike the anonymous citizen in *Robinson*, the informant in this case was previously known to the police. Second, although Mackey did not provide any details as to

why the informant was reliable, a common sense interpretation of Mackey's affidavit supports a conclusion that the informant had provided accurate information to the police in the past. Finally, unlike the situation in R*obinson*, not only did the informant provide accurate information about "innocent details" such as where Smith lived, the informant's information concerning Smith's criminal activity was at least partially corroborated by Mackey's discovery of marijuana in Smith's trash. The *Robinson* case therefore supports a finding that the informant in this case was credible and reliable enough to establish probable cause to arrest Smith based solely on the information he or she provided. At the very least, the *Robinson* case supports a finding that the informant's information combined with the discovery of marijuana in Smith's trash was sufficient to establish probable cause to arrest Smith at the time of the traffic stop.

III. BECAUSE THERE WAS PROBABLE CAUSE TO ARREST SMITH FOR POSSESSION OF MARIJUANA AFTER THE TRAFFIC STOP, THERE WAS ALSO REASONABLE SUSPICION TO SEARCH HIS VEHICLE.

Although the circuit court found that there was probable cause to arrest Smith, the court did not decide whether the evidence recovered from Smith's vehicle was lawfully obtained. (29:21-22). As noted previously, however, Mackey clearly had reasonable suspicion to search Smith's vehicle pursuant to *Gant*, once Smith admitted to possessing marijuana and marijuana was found on his person. As a result, there was no legal basis to suppress the cocaine, marijuana blunts and loaded .40 caliber handgun located in Smith's vehicle.

CONCLUSION

For the reasons set forth previously, the Court should affirm Smith's convictions for possession of cocaine, possession of THC, and carrying a concealed weapon.

Dated this _____ day of July, 2015.

Respectfully submitted,

David O'Leary
Rock County District Attorney

GERALD A. URBIK
Assistant District Attorney for
Rock County, Wisconsin
State Bar No. 1019578

Attorneys for Plaintiff-Respondent

Rock County District Attorney's Office
51 South Main Street
Janesville, Wisconsin 53545
(608)757-5615
(608)757-5725 (fax)

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 fond. The length of this brief is 2,904 words.

Dated this _____ day of July, 2015.

_____
Gerald A. Urbik
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.12(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 saved with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of July, 2015.

_____
Gerald A. Urbik
Assistant District Attorney