STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP1104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROY S. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Wisconsin Stat. § 302.113(7r) ("Act 79")[1] provides that a person who is released from prison and placed on extended supervision may be searched by a police officer without consent or a warrant if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime. Was Roy S. Anderson subject to Act 79 when he was lawfully stopped by Officer Mike Seeger (Officer Seeger) on August 25, 2015?

The trial court answered this question yes.

This Court should answer this question yes.

2. Did Officer Seeger reasonably suspect that Anderson was engaged in criminal activity when he conducted an Act 79 search of Anderson's person?

The trial court answered this question yes.

This Court should answer this question yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying the facts to a clearly worded statute and to well-established law.

INTRODUCTION

Anderson was convicted on June 9, 2013, on two counts of felony cocaine possession (2nd offense) and sentenced to one year in prison, and two years of extended supervision. After Anderson's release from prison and during his period of extended supervision, Officer Seeger received two tips from a

[1] The parties at the trial court refer to the various statutes created by this Act as Act 79, and therefore the State will refer to this legislation as Act 79 rather than by its statutory cite.

known reliable and credible informer that Anderson was selling crack cocaine in the back alley behind 1619 South Memorial Drive in Racine, Wisconsin. Within two-and-a-half weeks of receiving these two tips, Officer Seeger observed Anderson illegally riding a bicycle on the sidewalk near the back alley the informer had described.

Officer Seeger knew Anderson was on supervision and subject to Act 79. And Officer Seeger had a reasonable suspicion that Anderson was engaged in illegal drug activity, based on the two tips, Anderson's prior criminal history, Anderson's evasive actions when first observing Officer Seeger, and the location where Seeger first observed Anderson. Based on this reasonable suspicion, Officer Seeger lawfully searched Anderson pursuant to Act 79, and the search revealed two bags of crack cocaine, over $200 cash, and two cell phones.

STATEMENT OF THE CASE

On June 9, 2013, Anderson was convicted of two felony counts of possession of cocaine, 2nd offense. (R. 11:9.) Anderson was sentenced on October 29, 2013, and placed in prison for one year to be followed by two years of extended supervision. (*Id.*) Anderson's two years of extended supervision started on March 17, 2015, when he was released from prison. (*Id.*) Officer Seeger was aware that Anderson had been convicted previously of possession of crack cocaine and knew that Anderson had been released from prison to probation on March 17, 2015. (R. 24:18–19.)

Officer Seeger received two tips from a reliable and credible informant advising that Anderson was selling crack cocaine in the back alley behind 1619 South Memorial Drive in Racine. (R. 24:10.) Within two-and-a-half weeks of receiving the two tips, on August 25, 2015, at approximately 4:15 p.m., Officer Seeger observed Anderson illegally riding a bicycle on the sidewalk by 1619 South Memorial Drive, an

area known for drug trafficking. (R. 24:5–6, 9–10.) Upon observing Anderson, Officer Seeger made a U-turn so that he could stop him. (R. 24:7.) Officer Seeger and Anderson knew each other from prior contacts, and upon seeing Officer Seeger, Anderson made a right turn down the immediate close-by alley, and repeatedly made backward glances at Seeger. (R. 24:8–10, 13.)

Officer Seeger pursued Anderson and drove into the alley and observed that Anderson took his left hand off the bicycle's handlebars and placed it into his left front jacket pocket, as though he was attempting to conceal an item. (R. 24:8–9, 14.) Anderson kept his hand in his pocket until he was ordered to a stop. (R. 24:11, 14.)

Based on the two tips, his observations of Anderson's evasive actions, Anderson's prior criminal history and Anderson being in the exact area described by the tipster, Officer Seeger searched Anderson, pursuant to Act 79. (R. 24:8–11, 15.) This search led to the discovery of two individual bags of crack cocaine, over $200 in cash, and two cellphones. (R. 24:11–12.)

On August 26, 2015, Anderson was charged with one count of possession with the intent to deliver cocaine (second and subsequent offense). (R. 1.) Anderson filed a motion to suppress the evidence generated by Officer Seeger's search of his person. (R. 7.) The motion was heard on February 29, 2016, and Judge Piontek denied Anderson's motion holding both that Anderson was properly stopped, and that Officer Seeger's Act 79 search of Anderson was justified by reasonable suspicion. (R. 24:24–26.) Anderson ultimately pled no contest to possession of cocaine, one gram or less, with intent to deliver (second or subsequent offense) and was sentenced to 10 years imprisonment, comprised of five years initial confinement and five years extended supervision. (R. 26:24; 14:1.) Anderson now appeals this judgment of conviction.

SUMMARY OF ARGUMENT

Officer Seeger had ample reasons to perform an Act 79 search of Anderson. First, Officer Seeger knew that Anderson was eligible for an Act 79 search, since he was aware that Anderson had been released from prison on March 17, 2015, and was on supervision. Second, Officer Seeger had the requisite reasonable suspicion to trigger a lawful Act 79 search. This reasonable suspicion was based on: (1) Two tips from a reliable and credible informer that Anderson was engaged in selling crack cocaine in a back alley behind 1619 South Memorial Drive; (2) Anderson, upon seeing Officer Seeger, engaged in evasive activity including turning into an alley, repeatedly darting backward glances at Seeger, and taking his left hand off his bicycle's handlebar and placing it into his front left jacket pocket, in a manner consistent with trying to conceal something; (3) Officer Seeger's awareness of Anderson's prior criminal record of illegal narcotic activity; and (4) Officer Seeger initially observing Anderson in a high crime area near the precise location identified by the tipster.

Anderson seeks refuge from Act 79 by arguing that Officer Seeger did not have a sufficient basis to believe that Anderson was subject to the Act. This contention is contradicted by Officer Seeger's testimony that he had checked on Anderson's record after his release from prison and knew that Anderson was released to supervision. And any ambiguity as to Officer Seeger's testimony as to Anderson's eligibility for Act 79 treatment is clearly resolved by the presentence report, which details that Anderson, at the time of the challenged search, was on extended supervision after serving a prison term for two counts of possession of cocaine (second and subsequent offense).

Anderson also argues that even if Act 79 was applicable, its conditions were not met since Officer Seeger did not have reasonable suspicion that Anderson was engaging in criminal

behavior. As discussed above, Officer Seeger had the requisite reasonable suspicion, and the trial court correctly ruled that under the totality of circumstances Officer Seeger had reasonable suspicion Anderson was engaged in illegal drug activity.

STANDARD OF REVIEW

In reviewing a circuit court's order denying a motion to suppress evidence, the court's findings of evidentiary or historical fact are reviewed under the clearly erroneous standard. But, whether the court's application of the facts passes constitutional muster is a question of law reviewed de novo. *State v. Kassube*, 2003 WI App 64, ¶ 4, 260 Wis. 2d 876, 659 N.W.2d 499.

A police officer's belief that a subject has a certain status is reviewed under the totality of the circumstances. *Kassube*, 260 Wis. 2d 876, ¶¶ 7–8. In reviewing an order denying a suppression motion, this court is not confined to the evidence presented at the suppression hearing. Rather, this Court will examine the entire record to determine whether the search was reasonable. *State v. Begicevic*, 2004 WI App 57, ¶ 3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293.

ARGUMENT

I. The circuit court correctly found that Anderson was subject to Act 79.

A. Controlling legal principles.

2013 Wisconsin Act 79 took effect on December 14, 2013, and applies inter alia to all people released on extended supervision after that date. *See* Wis. Stat. § 302.113(7r). The Act, as it relates to people released on extended supervision, states in relevant part,

"A person released under this section, his or her residence, and any property under his or her control may be searched by a law enforcement officer at any time during his or her period of supervision if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime or a violation of a condition of release to extended supervision." *Id.*

B. Officer Seeger reasonably believed that Anderson was subject to Act 79, and Anderson was in fact subject to Act 79.

There is no dispute that Act 79 was operational when Anderson was searched on August 25, 2015. And upon review of the entire record, there can be no dispute that on August 25, 2015, Anderson was on extended supervision and thus under the Act's orbit. (R. 11:9.) Anderson concedes this point. (*See* Anderson's Br. 4 n.4.) The issue is whether Officer Seeger reasonably believed at the time of the search that Anderson was subject to Act 79. The facts show he did.

Officer Seeger testified that he was aware of Anderson's status because he had checked on it after Anderson was released, and this check showed that Anderson had been released to probation on March 17, 2015. (R. 24:19.) Officer Seeger's curiosity about Anderson's status is understandable

because it was Seeger who had arrested Anderson in 2012 for the offense that had resulted in Anderson's imprisonment and release to extended supervision. (R. 24:18–19.) To be sure, Officer Seeger mistakenly testified that Anderson was on probation, not extended supervision. But this difference in parlance is of no matter because the Act allows for a search for a probationer from a felony charge, in the same manner as it allows for a search of a person on extended supervision, and Officer Seeger testified that he knew that Anderson had been convicted of a felony. (R. 24:19.)[2]

Anderson argues that Officer Seeger was not reasonable in assuming that Anderson was on supervision, because there was no evidence at the suppression hearing showing that Anderson was on supervision on August 25, 2015. The totality of the circumstances point to the overwhelming likelihood that Anderson was on supervision on that date. Anderson had been convicted of two felony counts of possession of cocaine, 2nd offense, and was released from imprisonment on March 17, 2015. Under the terms of the sentence, Anderson was not released as a free man but was released to extended supervision. Officer Seeger testified that he was aware of all these circumstances when he searched Anderson on August 25, 2015. (R. 24:18–19.) It was very reasonable for Officer Seeger to presume that Anderson was still on supervision fewer than six months after being released from prison.

This case is very similar to *State v. Kassube*, where a police officer stopped Kassube because he believed that Kassube did not have a driver's license. *State v. Kassube*, 2003 WI App 64, ¶ 2, 260 Wis. 2d 876, 659 N.W.2d 499. The police officer based this assumption as to Kassube's driving status

[2] The language of section 302.113(7r) authorizing reasonable suspicion searches of people on extended supervision is the same language as section 973.09(1d) authorizing reasonable suspicion searches for people on probation for a felony.

on his knowledge that over the last nine to twelve years Kassube did not have a license, and though it had been eleven months since he last checked, the officer presumed that Kassube still did not have a license. *Id.* ¶ 3. This Court found the officer's presumption to be reasonable, opining that it is reasonable to believe that if a person had not obtained a license in nine to twelve years, he did not get a license in the eleven-month interval between the officer's last knowledge of Kassube's status and the stop. *Id.* ¶¶ 7–8. Similarly here, Officer Seeger could reasonably presume that Anderson was still on supervision given his knowledge that Anderson was released to supervision from two felony convictions on March 17, 2015, five months before the incident.

Anderson points to *Moreno v. Baca*, 431 F.3d 644 (9th Cir. 2005) and *People v. Sanders*, 73 P.3d 496, 507–08 (Cal. 2003), to support his claim that Officer Seeger's lack of knowledge as to Anderson's status cannot be salvaged by the later discovered fact that Anderson was indeed subject to the Act. (Anderson's Br. 11.) Anderson's reliance on these two cases is misplaced, as Officer Seeger testified to his knowledge of Anderson's status and also as to the source of this knowledge. In sharp contrast, in both *Moreno* and *Sanders*, the police had no knowledge at the time of the seizure of the probationary conditions which would have made the intrusions lawful. Here, Officer Seeger did not make an unlawful search under the known circumstances at the time of the seizure, and then seek to have the evidence salvaged by a later discovery. Rather, Officer Seeger made a lawful search under the circumstances he reasonably believed to be present, and the later discovered evidence merely confirmed the reasonableness of his judgment.

As discussed above, Officer Seeger reasonably believed that Anderson was subject to Act 79. And the record clearly shows that Anderson was subject to the Act. (R. 11:9.) Yet, Anderson claims that the trial court's finding that he was

subject to Act 79 was clearly erroneous. First, Anderson reprises the argument that Seeger did not testify to the basis of his knowledge that Anderson was on supervision on the exact date of the search. But, as argued above, Officer Seeger did testify as to why he thought Anderson was on supervision, and Seeger's belief was reasonable under the circumstances. Second, Anderson makes much of Officer Seeger's use of the word "probation," rather than Anderson's actual status of being on extended supervision. But in this case this is a difference without a distinction as people on probation for a felony are treated, under Act 79, in the exact same manner as people released to extended supervision. *See* Wis. Stats. §§ 973.09(1d) and 302.113(7r).

It is implausible to conclude that the trial judge's factual finding that Anderson was subject to Act 79 was clearly erroneous. Officer Seeger's testimony gave the trial judge an ample basis for making this finding. And more fundamentally, the presentence report conclusively demonstrates that Anderson was on extended supervision at the time of the challenged search. (R. 11:9.) This evidence is in the record, and this Court has held that it is not confined to the testimony at the suppression hearing in determining the reasonableness of a search. *State v. Begicevic*, 2004 WI App 57, ¶ 3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293. Anderson fails to show that the trial judge's finding of fact as to his Act 79 status was clearly erroneous because the record conclusively shows that the court's factual finding was correct.

Officer Seeger had a reasonable belief that Anderson was subject to Act 79 at the time of the disputed search. The trial court made a proper finding that Anderson was subject to the Act. And Anderson was in fact on extended supervision at the time of the search. Accordingly, the conditions of Act 79 control whether or not Officer Seeger's search of Anderson was lawful.

II. Officer Seeger had reasonable suspicion to search Anderson under Act 79.

As shown above, Anderson was subject to Act 79. But this does not end our inquiry as the Act requires the police, prior to the search, to have reasonable suspicion that the subject was engaged in criminal activity. They did.

A. Controlling legal principles.

All the relevant factors in a reasonable suspicion analysis are reviewed in the aggregate. *State v. Allen*, 226 Wis. 2d 66, 75, 593 N.W.2d 504 (Ct. App. 1999). Reasonable suspicion exists, if under the totality of the circumstances, the facts would warrant a reasonable police officer, in light of his training and experience, to reasonably suspect that a person has committed, was committing, or is about to commit a crime. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634.

Any one fact standing alone might not constitute reasonable suspicion, but that is not the test; the test is whether the totality of the facts taken together and the reasonable inferences about their cumulative effect, give rise to reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). In evaluating the factors in a reasonable suspicion calculus, the sum of the whole is greater than the sum of its individual parts. *Id.* The police are not required to rule out the possibility of innocent behavior in the formulation of reasonable suspicion. *Id.* at 58–59.

A suspect's prior criminal history is a legitimate factor in a reasonable suspicion analysis. *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551. Police knowledge of a subject's prior drug activity is relevant to a reasonable suspicion inquiry. *State v. Gammons*, 2001 WI App 36, ¶¶ 22–23, 241 Wis. 2d 296, 625 N.W.2d 623.

At the high end of the spectrum of police tipsters are informants whom the police reasonably believe to be truthful *State v. Rutzinski*, 2001 WI 22, ¶ 19, 241 Wis. 2d 729, 623 N.W.2d 516. If there is a strong indicia of the informant's veracity, there does not have to be any indicia of the informer's basis of knowledge. *Id.* ¶ 21.

Inherent to the very nature of probation is that probationers do not enjoy the absolute liberty entitled to regular citizens. *United States v. Knights*, 534 U.S. 112, 119 (2001). The primary assumption is that the probationer is more likely than an ordinary citizen to violate the law. *Id.* at 120.

B. The informer's two tips, Anderson's behavior when Officer Seeger observed him, Anderson's prior criminal history, and the location where Anderson was found, formulate the requisite reasonable suspicion for an Act 79 search.

Officer Seeger testified that he received two tips from a reliable and credible informer that Anderson was selling crack cocaine in an alleyway behind 1619 South Memorial Drive in Racine. (R. 24:10.) These two tips were received within two-and-a-half weeks of Anderson being stopped. (*Id.*) Anderson correctly points out that Officer Seeger did not testify as to how he knew the informer was reliable and credible. But Officer Seeger was not cross examined on this point and there is nothing in the record disputing Seeger's conclusory statements as to the informer's reliability. And while the tipster did not tell Officer Seeger the source of his information, Seeger's testimony points to his confidence as to the informer's veracity. The Wisconsin Supreme Court has held that a strong indicia of an informant's veracity reduces the need to show the informer's basis of knowledge. *Rutzinski*, 241 Wis. 2d 729, ¶¶ 19–21.

Anderson argues that the tips were too weak to be the basis for a reasonable suspicion search under Act 79. Anderson submits that this case is governed by this Court's holding in *State v. Kolk*, 2006 WI App 261, ¶ 19, 298 Wis. 2d 99, 726 N.W.2d 337. In *Kolk*, a citizen informer advised the police that Kolk was involved in an OxyContin transaction, and then further advised that Kolk was driving to Madison and very possibly could have OxyContin in his possession. *Kolk*, 298 Wis. 2d 99, ¶¶ 2–3. The police stopped Kolk on Highway 175 for speeding and, based on the citizen informer's tip, detained Kolk to pursue a drug investigation. This Court found the tip insufficient for the detention because there was no evidence as to the source of the tipster's information, and no substantial corroboration by the police of the citizen tip. *Id.* ¶¶ 15–16. Our case is distinguishable from *Kolk* in several ways: (1) The tips came from an informer depicted as reliable and credible; (2) Anderson, unlike Kolk, was a person familiar to the police with a known history of drug related offenses, essentially the same kind of behavior described by the tipster; (3) Anderson was recently released from prison and on extended supervision for felony drug crimes; (4) Kolk did nothing to further suspicion when encountered by the police, whereas Anderson, upon seeing Officer Seeger, took evasive action, turning into an alley, repeatedly turning around to make darting glances at Officer Seeger, and removing one hand from his bicycle handlebar and placing it in his front pocket in a manner suggestive of concealing something; and (5) Anderson was found in the exact location described by the tip, while Kolk was found on a stretch of highway not very consistent with driving to Madison.

Anderson further argues that the two tips lose substantial impact because of staleness, but the trial court properly countered this claim by correctly pointing out that drug trafficking is a continuing activity. (R. 24:26.) If the two tips stood alone they could be considered as a sufficient basis

for Anderson's being searched under Act 79. But they do not stand alone; they are supported by his evasive behavior upon observing the police, by his prior criminal record of drug trafficking, and by being first observed in the exact location described by the tipster.

Officer Seeger incorporated his observation of Anderson veering towards the alley, darting backward glances, and removing one of his hands from his bicycle handlebar and placing it into his jacket pocket, into the reasonable suspicion calculus. (R. 24:8–9, 14.) Anderson dismisses the significance of these observations citing *State v. Gordon*, 2014 WI App 44, 353 Wis. 2d 468, 846 N.W.2d 483, for the proposition that a subject patting his pockets upon observing the police does not give rise to reasonable suspicion. Again, the facts in *Gordon* are very different than those presented here. In *Gordon*, the police detained Gordon and two others and based their reasonable suspicion, in large part, on Gordon's patting the outside of his pants pocket in response to noticing the police presence. *Gordon*, 353 Wis. 2d 468, ¶ 14. Here, the police already had two tips of Anderson's criminal behavior and Anderson was not merely walking and patting his pocket, but instead, while riding a bike, took one hand off the handlebar and thrust it into his pocket. And Seeger had full knowledge of Anderson's past criminal history, and of his being on supervision after being released from prison. In this context Officer Seeger's observations of Anderson's evasive behavior would reasonably spawn much more suspicion than Gordon's pocket patting.

A key consideration in this case is the fact that Anderson was on supervision after being released from prison. In *United States v Knights*, the Supreme Court validated a condition of probation allowing for warrantless reasonable suspicion searches of a probationer's home. *Knights*, 534 U.S. at 121. Indeed, *Knights*' holding can be viewed as the precursor of Act 79, which codifies the concept

that reasonable suspicion searches of probationers are lawful. Thus, under *Knights*' reasoning, Anderson's criminal conviction history both diminishes his privacy rights and triggers a higher probability that he would violate the law. Anderson's criminal record adds strength to the two tips alleging Anderson's drug activity, and to the suspicious nature of Anderson's evasive behavior when he recognized Officer Seeger's presence in his area.

Finally, Officer Seeger initially observed Anderson in the exact location where the tipster had indicated Anderson was illegally selling crack cocaine. (R. 24:18.) And the area is known for high drug trafficking. (R. 24:9.) So, the location where Officer Seeger first observed Anderson adds further strength to the two tips, to the suspicious nature of Anderson's actions upon first observing the police and to Anderson's prior record of illegal drug activity.

The totality of the circumstances in this case point to Anderson engaging in illegal drug activity when Officer Seeger searched him. Thus, the trial court correctly held that Officer Seeger had the requisite reasonable suspicion to believe that Anderson was engaging in illegal drug trafficking. (R. 24:26.) And since, as argued above, Anderson was subject to Act 79, Officer Seeger properly searched Anderson.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court's judgment of conviction.

Dated this 30th day of November, 2017.

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 4,097 words.

Dated this 30th day of November, 2017.

_____
DAVID H. PERLMAN
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 30th day of November, 2017.

_____
DAVID H. PERLMAN
Assistant Attorney General