STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP1209-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MOSE B. COFFEE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE JOHN A. JORGENSEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was the warrantless search of Defendant-Appellant Mose B. Coffee's vehicle incident to his arrest for operating while intoxicated unreasonable in scope, such that the fruits of the search—including nearly a kilogram of marijuana—must be suppressed?

The circuit court answered, "No."

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

INTRODUCTION

Oshkosh Police Officer Timothy Skelton pulled over Coffee for driving without a front license plate. Officer Skelton observed multiple indicia that Coffee was driving while intoxicated and had Coffee perform multiple field sobriety tests, which Coffee failed. Officer Skelton then administered a preliminary breath test, which indicated that Coffee's blood alcohol content was above the legal limit, and arrested Coffee.

During a search of Coffee's vehicle incident to the arrest, Oshkosh Police Officer Brenden Bonnett located a mason jar containing marijuana in a bag behind the driver's seat. This discovery led to a search of the trunk, where Officer Bonnett and Officer Benjamin Fenhouse discovered nearly one kilogram of marijuana. The State charged Coffee with possession with intent to deliver THC, possession of drug paraphernalia, operating a motor vehicle while intoxicated, and operating with a prohibited alcohol concentration. Coffee moved to suppress the discovery of the

marijuana in his car, arguing that Officer Bonnett's search of the bag behind the driver's seat was outside of the scope of a lawful search incident to arrest. The circuit court denied Coffee's motion, and Coffee pleaded no contest.

Now, on appeal, Coffee renews his challenge to the search of the bag in his car incident to his arrest. Coffee claims the search was unreasonable. However, it was reasonable for Officer Bonnett to believe that he would find evidence of operating while intoxicated in the bag, which was within Coffee's reach while driving. Because the scope of the search was reasonable, it was a lawful search incident to arrest under the Fourth Amendment. The circuit court properly denied Coffee's motion to suppress the results of the search, and this Court should affirm.

STATEMENT OF THE CASE

On the evening of August 30, 2017, Officer Skelton was on patrol in Oshkosh when he saw a vehicle, driven by Coffee, without a front license plate displayed. (R. 43:6–7.) Officer Skelton executed a traffic stop of the car in the parking lot of a nearby bar. (R. 43:7.) Coffee parked his car very close to another vehicle and got out, at which point Officer Skelton told him to remain with his car. (R. 43:7–8.) As Officer Skelton talked to Coffee, he noticed multiple indications that Coffee had been drinking, including an odor of intoxicants coming from the car, Coffee's bloodshot and glassy eyes, and Coffee's slurred speech. (R. 43:9–10.)

Officer Skelton asked Coffee to perform multiple field sobriety tests, including the horizontal gaze nystagmus test, the divided attention alphabet test, and the nine step walk and turn test. (R. 43:12, 15, 19.) Based on Coffee's performance on these tests, Officer Skelton concluded that he had been operating his car under the influence of intoxicants and administered a preliminary breath test, which returned a result of .14. (R. 43:21–22.) Officer Skelton

then arrested Coffee, handcuffed him, and placed him in the back of the squad car. (R. 43:22.)

During the traffic stop, Officer Bonnett arrived on the scene to serve as backup, if necessary. (R. 43:62.) After Officer Skelton arrested Coffee, Officer Bonnett began a search of Coffee's car incident to the arrest searching for "any substance in the vehicle that could impair a driver's ability to operate the motor vehicle safely," including "prescription medication, nonprescription medication, alcohol, illegal drugs, or even up to possibly an inhalant such as Dust-Off." (R. 43:62–63.) A short time after beginning the search, Officer Bonnett found a cloth bag behind the driver's seat. (R. 43:63–64.) The bag contained several items, including multiple cell phones and some clothing. (R. 43:64; Ex. 1 at 2:50.) In the bag, Officer Bonnett also found mason jars containing flakes of marijuana within approximately one minute of beginning the search of the bag. (R. 43:64–65.) After Officer Bonnett discovered the mason jars, Officer Fenhouse searched the trunk of Coffee's car, where he found almost one kilogram of marijuana packed in vacuum-sealed bags. (R. 1:4–5; 43:78–79.)

The State charged Coffee with four counts: (1) possession with intent to deliver THC, (2) possession of drug paraphernalia, (3) second offense operating a motor vehicle while intoxicated, and (4) second offense operating with a prohibited alcohol concentration. (R. 6:1–2.) Coffee moved to suppress the results of the search of his car incident to arrest, relying heavily on this Court's unpublished opinion in *Hinderman*[1] to argue that the search violated his Fourth Amendment rights. (R. 14:1–3.)

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[1] *State v. Hinderman*, No. 2014AP1787-CR, 2015 WL 569134 (Wis. Ct. App. Feb. 12, 2015) (unpublished) (A-App. 136–39).

At a hearing on January 3, 2018, the Winnebago County Circuit Court, the Honorable John A. Jorgensen, presiding, denied Coffee's motion. (R. 43:93–94.) The court reasoned that Coffee "could easily put his hand behind the seat of the car to conceal something," so the scope of the search incident to Coffee's arrest was reasonable. (R. 43:92.) Coffee then pleaded no contest to the possession with intent to distribute and OWI charges. (R. 43:96–97.) The circuit court sentenced Coffee to ten days in jail for the OWI and withheld sentence on the possession charge subject to Coffee's successful completion of two years of probation. (R. 43:106–07.)

Coffee now appeals.

STANDARD OF REVIEW

Typically, this Court reviews an order denying a motion to suppress under a two-step analysis. *State v. Robinson*, 2009 WI App 97, ¶ 9, 320 Wis. 2d 689, 770 N.W.2d 721. This Court will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous. *Id.* Under the clearly erroneous standard, appellate courts will uphold a circuit court's finding of fact unless the finding goes "against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (quoting *State v. Sykes*, 2005 WI 48, ¶ 21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277). On the other hand, the application of constitutional principles to the facts found presents a question of law that this Court reviews de novo. *Robinson*, 320 Wis. 2d 689, ¶ 9.

ARGUMENT

The circuit court properly denied Coffee's motion to suppress.

A. Legal principles

The United States and Wisconsin Constitutions guard against unreasonable searches and seizures. U.S. Const. Amend. IV; Wis. Const. art. 11. A warrantless search is per se unreasonable unless it falls within a clearly delineated exception to the warrant requirement. *State v. Artic*, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430. One such exception is the search of an automobile incident to a lawful arrest. *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *State v. Dearborn*, 2010 WI 84, ¶ 27, 327 Wis. 2d 252, 786 N.W.2d 97. Pursuant to *Gant,* police may search a vehicle incident to the arrest of an occupant "if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556 U.S. at 351. *See also Dearborn*, 327 Wis. 2d 252, ¶ 26. In addition, police may search the vehicle for evidence of an offense other than the offense of arrest if they have probable cause to believe the vehicle has evidence of that other criminal activity. *State v. Lefler*, 2013 WI App 22, ¶ 14, 346 Wis. 2d 220, 827 N.W.2d 650.

B. That body cam footage was involved does not subject the circuit court's factual findings to de novo review.

As noted above, this Court reviews the circuit court's findings of fact under the clearly erroneous standard. Coffee disputes this, contending that "this Court is on equal footing with the circuit court to make factual determinations based

on the officer's body camera footage of the search; therefore, factual findings derived from the video, such as the positioning of the bag and the glass mason jars within the bag, are reviewed *de novo*." (Coffee's Br. 10.) As support for this position, he cites *State v. Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196. (Coffee's Br. 9.) Coffee also cites *State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898, for the proposition that, "When a video is ambiguous or conflicts with testimony deferential review applies." (Coffee's Br. 9.) Contrary to Coffee's assertion, the deferential review standard described in *Walli* is the correct standard for this Court to apply in this case.

Jimmie R.R. is a 1999 case involving sexual assault and incest charges against the defendant related to his sexual assaults of his five-year-old daughter. *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 3. The victim had given a videotaped interview in which she accused her father of the assaults. *Id.* ¶ 5. The defendant challenged the admissibility of the videotaped interview, arguing that it was not clear that the victim understood that she could be punished for making any false statements during the interview. *Id.* ¶ 7.

This Court, in reviewing the admissibility of the interview, discussed the standard of review: "Ordinarily, a determination of whether a child understands that false statements are punishable is a question of fact." *Id.* ¶ 39 (citations omitted). But "since the only evidence on this question is the videotape itself, we are in as good a position as [the circuit court] to make that determination. As a result, the question becomes one that we review de novo." *Id.* As support for this conclusion, the court cited *State v. Pepin*, 110 Wis. 2d 431, 439, 328 N.W.2d 898, (Ct. App. 1982), in which it stated "We note that this against-interest statement

is documentary; that it was made is undisputed; its maker chose not to testify and so no demeanor evidence exists. The trial court would be in no better position to determine this question of law than are we." *Id.* Notably, both *Jimmie R.R.* and *Pepin* involved situations where there was no evidence beyond a videotape for the court to consider. *See id.*

Walli is a 2011 case involving dash cam video of the defendant's actions immediately before a traffic stop that led to an OWI conviction. *Walli*, 334 Wis. 2d 402, ¶¶ 1–2. There, the court acknowledged that "the Wisconsin Constitution limits [the court's] jurisdiction to appellate jurisdiction, blocking [its] ability to engage in fact finding." *Id.* ¶ 12. The court explicitly rejected the defendant's argument that the documentary evidence exception to the clearly erroneous standard of review applied. *Id.* ¶ 13. In so doing, this Court noted that in addition to the video evidence, the State had also presented the testimony of the officer who stopped Walli. *Id.* ¶ 14. The officer had testified not only that the video was a fair and accurate representation of what he saw, but also as to his own observations about Walli's driving. *Id.*

The *Walli* court finally noted that the circuit court had based its factual findings on the video evidence as well as on the credibility of the officer, thus weighing all of the evidence. *Id.* The court therefore held, "when evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording." *Id.* ¶ 17.

This case is more like *Walli* than *Jimmie R.R.* The evidence here comes not only from video footage, but also from the testimony of three officers that participated in the stop and search of Coffee's car. As the circuit court stated, it was "[h]ard to see everything on the video, but, you know,

the video doesn't reveal everything. We have to rely on the officers as well, their training and experience." (R. 43:58.) For that reason, this Court reviews the historical facts that the circuit court found for clear error, and not de novo. *See Walli*, 334 Wis. 2d 402, ¶ 17.

C. Officer Bonnett executed a search incident to arrest that was reasonable in scope under the Fourth Amendment.

Police arrested Coffee for operating while intoxicated. (R. 1:3.) The OWI statute provides that a person violates it when operating a motor vehicle under the influence of drugs or alcohol. *See* Wis. Stat. § 346.63. A search of a vehicle incident to arrest is lawful in scope to the extent police reasonably "believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 351; *Dearborn*, 327 Wis. 2d 252, ¶ 26.

At issue is the reasonableness of Officer Bonnett's search of the bag behind the driver's seat of Coffee's car. (Coffee's Br. 16.) Coffee does not challenge the lawfulness of Coffee's arrest for OWI, nor does he challenge the search of the back of his vehicle following Officer Bonnett's discovery of paraphernalia in the bag behind the driver's seat—that is, Coffee concedes that the discovery of the mason jars, if lawful, was enough for police to expand the scope of the search to include the back of the vehicle. (Coffee's Br. 12–19.) Therefore, the State limits its argument to whether the search of the bag behind the driver's seat was lawful.

Officer Bonnett searched Coffee's car for "any substance in the vehicle that could impair a driver's ability

to operate the motor vehicle safely."[2] (R. 43:63.) Two facts are crucial when determining whether the search of Coffee's car was reasonable: first, Coffee was intoxicated, and second, Coffee had been in the driver's seat of his car. (R. 43:21–22.) Because of these facts, it was reasonable for Officer Bonnett to believe that evidence tying him to the crime—a bottle, a can, or a flask, for example—was near the area Coffee sat when Officer Skelton first pulled him over. This includes the area immediately behind the driver's seat, which was accessible to Coffee while he was in the driver's seat. (R. 43:92.) As the circuit court found, Coffee "could easily put his hand behind the seat of the car to conceal something," so it was irrelevant that Officer Bonnett found the mason jars inside the bag and below some other items. (R. 43:92.) The court's finding, which was based on Officer Bonnett's testimony and body cam video, is not clearly erroneous. The court further reasoned that Coffee could have concealed evidence of his intoxication by shoving it down into the bag or covering it with other items in the bag. (R. 43:92–93.) *Gant* does not require that a search incident to arrest is limited to areas readily visible to officers, only that the search is reasonable in scope. *Gant*, 556 U.S. at 351. The

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[2] Officer Bonnett stated that his search would have included looking for "prescription medication, nonprescription medication, alcohol, illegal drugs, or even up to possibly an inhalant such as Dust-Off." (R. 43:63.) Coffee suggests that, to the extent Officer Bonnett's search included looking for drugs besides alcohol, the search was inappropriate. (Coffee's Br. 3–4.) However, because Officer Bonnett found the mason jars in an area where he reasonably could have expected to find evidence of alcohol use such as a bottle or flask, this Court does not need to determine whether a search for drugs besides alcohol would have been reasonable in scope.

circuit court's reasoning is sound—the search here was reasonable in its scope, and was therefore lawful.

Coffee suggests that without some indicia that he was drinking while driving or that he hid something as Officer Skelton pulled him over, any sort of search beyond a plain view look at the car would be illegal. (Coffee's Br. 15.) This position defies the spirit of *Gant*. *See State v. Smiter*, 2011 WI App 15, ¶¶ 15–16, 331 Wis. 2d 431, 793 N.W.2d 920 ("*Gant* expressly permits searches for evidence relevant to the crime of arrest and does not require police to stop that search once *some* evidence is found.").

Indeed, in *Gant*, the Supreme Court stated that police could search the passenger compartment of a vehicle when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). For example, the Court explained, such a belief that a search would reveal evidence would not be reasonable if the crime was a seat belt violation or speeding. *Id.* at 343–44 (citing *Atwater v. Lago Vista*, 532 U.S. 318, 324 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118 (1998)). Here, unlike speeding or a seat belt violation, the law Coffee broke in this case—operating while intoxicated—involves both the vehicle and an intoxicant. *See* Wis. Stat. § 346.63. Hence, the police had a reasonable basis to believe that evidence of intoxicants might be found in the vehicle. *See Gant*, 556 U.S. at 344.

Coffee also relies on this Court's unpublished decision in *Hinderman*, which he considers to be on all fours with the facts of this case. (Coffee's Br. 17–18.) *Hinderman* does not provide persuasive support. In *Hinderman*, police stopped Hinderman and arrested her for OWI. *State v. Hinderman*, No. 2014AP1787-CR, ¶ 3, 2015 WL 569134 (Wis. Ct. App.

Feb. 12, 2015) (unpublished) (A-App. 136–39). While she was outside the car, police searched it and found her purse; inside it was a small zippered pouch (three inches long, three inches high, and three-quarters of an inch wide), in which police found marijuana and a pipe. *Id.* ¶ 4, A-App. 136-37. The circuit court granted Hinderman's subsequent motion to suppress, and this Court affirmed when the State appealed. *Id.* ¶ 1, A-App. 136.

Hinderman is distinguishable from Coffee's case. In *Hinderman*, this Court adopted the reasoning of the circuit court, which held that it was not reasonable for police to believe that they would find alcohol in the small closed pouch: "[The small pouch] wouldn't hold a half pint of alcohol, it wouldn't hold a can of beer, it wouldn't hold the flask[-]type things that can be used to carry alcohol—it may . . . contain one of those little one[-]shot bottles of alcohol. But that is simply too remote . . . ." *Hinderman*, 2015 WL 569134, ¶ 10, A-App. 137–38. Here, unlike the pouch in *Hinderman*, Coffee's bag was not zipped shut. *Id.* ¶ 4, A-App. 136. (R. 43:64; Ex. 1 at 2:00.) More significantly, unlike the zippered pouch in *Hinderman*, Coffee's bag was approximately 10 inches by 13 inches—big enough to contain beer or liquor bottles, a flask, or other evidence of Coffee's driving while intoxicated. (R. 43:64; Ex. 1 at 2:00.) These differences in the scope of the search in *Hinderman* greatly diminish its applicability here.

Because the search of the bag was lawful, suppression is not warranted and Coffee is not entitled to withdraw his plea. This Court should affirm.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 7th day of November, 2018.

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 3,159 words.

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

I hereby certify that:

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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 7th day of November, 2018.

_____
JOHN A. BLIMLING
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