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WISCONSIN COURT OF APPEALS
District I

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Appeal No. 2020AP000588
Circuit Court Case No. 2018CM963

KENDALL MARCEL WHITE

Defendant-Appellant

On appeal from a Judgment Entered
in the Circuit Court for Milwaukee County,
the Honorable Dennis Flynn, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S
BRIEF and APPENDIX

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ISSUE PRESENTED

1. Whether Officer Gaglione violated Mr. White's Fourth Amendment rights by unreasonably extending his detention beyond its original scope.

Answered by the trial court: No.

2. Whether Ms. Gee had authority to consent to Officer Gaglione's search of the glove compartment.

Answered by the trial court: Not answered.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issues in this appeal, oral argument is not recommended.

STATEMENT ON PUBLICATION

Publication is not recommended. The case presents no issues that have not been clarified by existing law.

STATEMENT OF THE CASE

I. BASIC FACTS

On February 28, 2018, around 8:00 p.m., three City of Milwaukee police officers were on patrol on the city's north side. (R40:6). As they turned onto Palmetto Street, they spotted a 2007 Audi Q7 parked on the side of the street. (R40:8). The Audi Q7 disturbed Officer Donald Gaglione because it was parked about two feet away from the curb, had no rear license plate, and it appeared to him that the windows were tinted too dark. (R40:8). Officer Gaglione activated his lights and pulled up behind the vehicle, but not before a

woman walked up to the vehicle and sat down in the passenger seat. (R40:13, 25).

Thereafter, Gaglione approached the driver, a young African-American male identified as the defendant, Kendall White. (R40:15). The woman sitting in the front passenger seat was identified as Lloyshonda Gee. (R40:34).

In response to Officer Gaglione's questions, White said he was the owner of the Audi, that he had just purchased it, but had not had time to register it. (R40:17). But White did tell Gaglione that there was a temporary plate displayed in the back window. (R40:16). Officer Kotnik examined the plate and reported to Gaglione that it was a temporary Illinois plate that had expired a month earlier. (R40:17).

For reasons unexplained, and despite the fact that White said he owned the Audi Q7, Officer Gaglione wanted to verify ownership. (R40:17). To those ends, he asked White to exit the vehicle so he could search for the Audi's vehicle identification number. (R40:21-22). He found it on the passenger side of the Audi and wrote it down in his memo book. (R40:39). But rather than run the VIN through the department computers, he asked Ms. Gee to open the glove compartment to check for any paperwork that might identify White as the owner. (R40:22-23). Ms. Gee complied and when she opened the glove box the officers spotted a Smith & Wesson .380 caliber handgun. (R40:23). Because White did not have a concealed carry permit, Gaglione placed him under arrest. (R1).

II. PROCEDURE IN THE TRIAL COURT

In March 2018, the Milwaukee County District Attorney charged White with one count of carrying a concealed

weapon, a Class A Misdemeanor. (R1). In July 2018, White moved to suppress the gun evidence on grounds that, had the police not violated in Fourth Amendment rights, they would not have discovered the hand gun. (R8). Further, he argued, Ms. Gee lacked authority to consent to the search of his glove compartment. (R8).

The circuit court heard Mr. White's motion in August 2018. At the hearing Officer Gaglione testified about the events of February 28, 2018 and why he did what he did. (R40). After listening to the testimony and the arguments of counsel, the court denied White's motion to suppress. (R40:64). It concluded that Officer Gaglione's search was entirely proper. (R40:64).

Thereafter, White tried his case to a jury in February 2019. (R46-49). The jury found him guilty as charged. (R49:47). In May 2019, the circuit court sentenced him to 75 days in the House of Correction, but stayed that sentence in favor of twelve months of probation. (R52:22). It is from this Judgment of Conviction that White appeals.

Noteworthy, documents inside the glove compartment did reveal that Kendall White was indeed the owner of the 2007 Audi Q7. (R40:24, 52-53).

STANDARD OF REVIEW

Whether the circumstances of a stop or detention meet constitutional standards is a question of law that this Court reviews de novo. *State v. Gammon*, 2001 WI App 36, ¶6, 241 Wis.2d 296, 625 N.W.2d 623.

ARGUMENT

In this appeal Kendall White argues that the circuit court erroneously denied his motion to suppress for two reasons: (1) The government's search of his vehicle was conducted in violation of his Fourth Amendment rights, as Officer Gaglione had no grounds to continue searching the Audi Q7 after White admitted it was not registered, and (2) Ms. Gee lacked authority to consent to the search of his vehicle.

I. Fourth Amendment Standards.

A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures. *State v. Gammon*, 2001 WI App 36, ¶6, 241 Wis.2d 296, 625 N.W.2d 623. To stop a vehicle, police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law. *Id.* When a court reviews a Fourth Amendment challenge it first determines whether the initial interference with an individual's liberty was justified. *Id.* If so, it then considers whether subsequent police conduct was reasonably related in scope to the circumstances that justified the stop. *Id.*

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Id.* ¶11. The scope of detention must be carefully tailored to its underlying justification. *Id.* After the initial stop, the scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention – keeping in mind that these

factors, like the factors justifying the stop in the first place, must be particularized and objective. *Id.*

II. Officer Gaglione violated Mr. White's Fourth Amendment rights by unreasonably extending his detention beyond its original scope.

In this appeal, Mr. White concedes that Gaglione's initial interference with his liberty was justified for the reasons Gaglione gave at the motion hearing: White had parked his vehicle too far from the curb, the tint on his car windows appeared to be too dark, and he did not have a rear license plate. (R40:8). These three reasons, White submits, would lead a police officer to reasonably believe that White was then and there violating the law.

What he argues in this appeal, however, is that Gaglione extended his investigation beyond its original justification. Once White told Gaglione that he had not had time to register the Audi, Gaglione's detention should have ended. At that moment Gaglione had effectuated the purpose of his stop – to find out whether the Audi was registered. After White admitted it was not, Gaglione should have issued him a ticket and sent him on his way. After White's admission, no additional factors came to Gaglione's attention that would have caused him to believe the Audi was stolen. Whether White owned the vehicle, or whether it was stolen, was not one of the reasons Gaglione gave for initiating the stop and, therefore, Gaglione exceeded the scope of his detention, rendering it unreasonable.

The transcript of Gaglione's testimony at the motion hearing illustrates the unreasonableness of his detention. The night of the incident, Gaglione was wearing a body camera. (R40:11). During the motion hearing the district attorney

played the recording, narrating the start and stop times. (R40:11-12).

For example, beginning at 25 seconds and pausing at 46 seconds, the recording showed Gaglione approach White and explain the reasons for the stop. (R40:14).

At 46 seconds to 1 minute and 9 seconds the two discuss the temporary license. (R40:16).

At 1 minute and 9 seconds to 2 minutes and 23 seconds is where White tells Gaglione that he recently bought the Audi but had not yet registered it. (R40:17).

At 2 minutes and 23 seconds to 3 minutes and 12 seconds shows Gaglione ask White to step out of the vehicle. (R40:20).

At 3 minutes and 12 seconds to 5 minutes and 44 seconds shows Gaglione searching for a VIN number and asking Ms. Gee if she could find a document with White's name on it. (R40:22).

Finally, at 5 minutes and 44 seconds to 6 minutes shows Ms. Gee opening the glove compartment revealing the hand gun. (R40:23).

As the transcript shows, Gaglione effectuated the purpose of his stop between one and two minutes after approaching Mr. White. That is, he established that the vehicle was not registered. But rather than end his detention at this point, he continues his search for another four minutes looking for some way to identify the owner of the Audi. Because this continued search exceeded the scope of the detention it violated Mr. White's Fourth Amendment rights.

Now the State made much ado at the motion hearing about Gaglione's general knowledge about missing license plates and stolen vehicles, suggesting there was some connection between the two and suggesting further that Gaglione was justified in demanding proof of ownership. (R40:13, 18-19). Mr. White submits he was not.

Gaglione did not detain White because he thought the Audi was stolen. At least that was not one of the reasons he gave for detaining White. Nor had Gaglione been told to be on the lookout for a stolen Audi Q7. (R40:43-44). Nor did he have information on Kendall White that would indicate he might be a car thief. (R40:43-44). Gaglione's generalized belief that African-American males driving nice, yet unlicensed, Audis around Milwaukee's north side might be car thieves is not enough to warrant his extended detention of White. (R40:13-14). At minimum, he would need specific, articulable facts that led him to believe this particular Audi was stolen.

Now, the circuit court found this to be a proper search. (R40:63). For reasons unexplained it felt Gaglione needed to know who owned the Audi. (R40:60). The court's finding in this regard is curious given that proof of ownership is not among the ordinary inquiries an officer is permitted to make during a traffic stop. *State v. Wright*, 2019 WI 45, ¶24 n.20, 386 Wis.2d 495, 926 N.W.2d 157. Driver's license, registration, and proof of insurance, yes, but not proof of ownership. *Id.*

Likewise, the trial court felt Gaglione conducted a proper search because he did not stray from his primary purpose. (R40:64). This finding is just wrong, because Gaglione's primary purpose in detaining White was to ascertain whether the Audi was registered, not whether it was stolen. (R40:14).

White submits that the circuit court reached the wrong decision when it concluded Gaglione had conducted a proper search. Had it undertaken the proper Fourth Amendment inquiry, meaning had it scrutinized whether Gaglione tailored his detention to its underlying justification, it would have concluded this was not a proper search.

III. Ms. Gee had no authority to consent to Gaglione's search of the glove compartment.

White's second claim of error is that Ms. Gee had no authority to consent to Gaglione's search of the glove compartment. Accordingly, the circuit court should have suppressed the fruits of that search.

The general rule is that a third-party with common authority over, and a sufficient relationship to, property may consent to its search. *United States v. Matlock*, 415 U.S. 164, 171 (1974). A third-party consent search is permissible if the consenter has actual authority to consent or if the officer reasonably believes that the third-party possesses common authority over the property to be searched. *Illinois v. Rodriguez*, 497 U.S. 177, 186-87 (1990). The test for apparent authority is an objective one. In assessing the officer's reliance on consent, this Court evaluates whether the officer's belief that the third-party had the authority to consent was objectively reasonable in view of the facts and circumstances known at the time of the search. *Id.* at 188-89.

Further, the consent inquiry focusses not necessarily on the third-party's authority over the specific object in question, but on the third-party's authority over the premises in which the object is located. *State v. Matejka*, 2001 WI 5, ¶36, 241 Wis.2d 52, 621 N.W.2d 891.

Under the circumstances in Mr. White's case, it was not reasonable for anyone to conclude that Ms. Gee had authority to give Officer Gaglione permission to look into the glove compartment. For starters, objectively it should have been fairly obvious to Gaglione that Gee was not the owner of the Audi. He saw her walk up to the vehicle and climb into the passenger seat as if she were a guest of White, the driver. (R40:25).

Second, White had already told Gaglione that he was the owner of the vehicle, that he had recently purchased it, and that he had not had time to register it. (R40:17). White told the officer about the temporary plate in the back window, suggesting he was familiar with the vehicle. (R40:16).

Third, Ms. Gee never said anything to Gaglione to suggest that she was the owner of the Audi or had authority over it. (R40:35, 40).

Fourth, by the time Gaglione asked Gee to open the glove box he knew that White was uncomfortable with Gaglione's continued questioning. At the suppression hearing Gaglione described White as agitated, so much so that he had to order White out of the Audi and ask him to stand behind it while he searched for the VIN number. (R40:21).

Under these circumstances it would not be objectively reasonable to conclude that somehow Ms. Gee had authority to consent to a search of the Audi's glovebox. Conversely, these facts suggest just the opposite – that White was agitated because Gaglione kept questioning his ownership.

Furthermore, where a suspect is present and objecting to a search, implied consent by a third-party with an inferior

privacy interest is ineffective. *United States v. Impink*, 728 F.2d 1228, 1234 (9th Cir. 1984). This rule seems to cover the situation here. White was present. Under the circumstances, it would have been far more reasonable for Gaglione to ask White to open the glove compartment, not Gee. It appears Gaglione intentionally removed White to the back of the Audi just so he could ask Gee instead.

For these reasons Ms. Gee did not have authority over the Audi, Officer Gaglione knew she did not have authority, and therefore his search of the glovebox was not by consent.

Noteworthy is that the circuit court did not address this aspect of White's motion to suppress, so this Court does not have the benefit of the lower court's reasoning on it. White submits that this is a glaring omission on the circuit court's part. How the government gets that glove compartment open to look inside is the Fourth Amendment question in the case.

White submits that had the circuit court considered the third-party consent issue that he had raised, it would have concluded that Ms. Gee had no authority to open the glove compartment. This would have been a second reason to suppress the evidence due to an unlawful search.

CONCLUSION

For the reasons stated, Mr. White asks this Court to determine, as a matter of law, that his detention on the night of February 28, 2018 did not comply with the constitutional standards of the Fourth Amendment, for this reason his motion to suppress the hand gun evidence should have been granted, and therefore his judgment of conviction must be vacated.

Dated this 22nd day of May 2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,458 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of s. 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 22nd day of May 2020.

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