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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
REPLY BRIEF

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I. OFFICERS DID NOT UNLAWFULLY EXTEND THE DURATION OF THE TRAFFIC STOP.

A. The issue was not raised in the trial court so it cannot be raised now.

The first issue the State raises in its response is that Kendall White has raised the unlawful detention issue for the first time on appeal. (Resp. at 5). Pshaw.

White's basic contention in the trial court, and in this Court, is that Officer Gaglione violated his Fourth Amendment rights by conducting an unlawful search of his vehicle. (R8:1, 5; Br. at 5). In his closing argument, he argued to the circuit court that Gaglione did not have probable cause to believe his vehicle was stolen and for this reason Gaglione had no justification for searching the glove compartment. (R39:56-57).

Likewise, during the motion hearing, defense counsel asked Gaglione specifically:

Q And at that point (after removing White to the rear of the vehicle) you wouldn't – you wouldn't say that you had probable cause to search the vehicle, right?

A That's correct.

Q You didn't have any – any narcotic – normal narcotics didn't exist.

A No.

Q And you hadn't seen a weapon.

A No.

(R39:36-37).

What White was attempting to establish on cross, and in closing argument, is that Gaglione violated his Fourth Amendment rights by continuing to search the vehicle without probable cause or even reasonable suspicion.

On appeal, he attempts to do the same thing only more methodically than one can do at an evidentiary hearing, by arguing that while Gaglione may have been initially justified in stopping White, White's detention should have ended the moment White admitted he had not registered the vehicle. (Br. at 5-8). In other words, after establishing the Audi was not registered – which was the basis for the stop – Gaglione had no valid reason – no probable cause – to conduct a search of the vehicle.

The arguments below are the same as on appeal. Gaglione had no legal basis to search White's vehicle.

B. Officer Gaglione was permitted to perform ordinary inquiries.

The next argument the State advances is that Gaglione was permitted to make ordinary inquiries during the stop and included among those inquiries was the right to ask whether White owned the Audi. (Resp. at 5-6). The State also says determining ownership *was one purpose* for the stop due to Gaglione's experience with stolen cars. (Resp. at 6). Neither statement is true.

First off, determining ownership was not one of Gaglione's purposes for the stop. At the hearing Gaglione testified unequivocally that he stopped White because he was

parked two feet off the curb, had no visible plates on the rear of his vehicle, and the vehicle had darkly tinted windows. (R39:8). When asked specifically by the prosecutor if these were the reasons that drew his attention to the Audi he replied *they are*. (R39:8). In fact, he testified that he had not received any reports about a stolen vehicle, or a suspicious Audi Q7, or a stolen dark gray Audi Q7, nor had he any reason to think White's Audi was stolen. (R39:43-44). Therefore, Gaglione had no articulable reason for questioning White's ownership or believing his car was stolen.

Second, the mission of a traffic stop includes: (1) addressing the traffic violation that warranted the stop; (2) conducting ordinary inquiries incident to the stop; and (3) taking negligibly burdensome precautions to ensure officer safety. *State v. Wright*, 2019 WI 45, ¶24, 386 Wis.2d 495, 926 N.W.2d 157. Ordinary inquiries involve checking the driver's license, determining whether there are any outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Id.* ¶24, n.20.

Not included among the ordinary inquiries is to question the driver whether he owns the vehicle. In fact, the law does not require drivers to "own" the vehicle they are driving. Were it otherwise people driving rental cars, leased vehicles, company vehicles, or even their parent's car would be driving unlawfully. This is not the law.

The proper inquiry is whether the vehicle is registered, as that is all the law requires. Wis. Stats. § 341.04(1). When White told Officer Gaglione that he had not yet registered the vehicle, Gaglione's inquiry should have ended and at most Gaglione should have issued White a traffic citation. Wis. Stats. § 341.04(3). A "no" answer to the registration question

did not permit Gaglione to then extend the stop to conduct a search of the vehicle to establish who might be the owner.

II. THE FOURTH AMENDMENT WAS NOT IMPLICATED BECAUSE GAGLIONE'S ACTIONS WERE REASONABLE.

A. Protection from unreasonable searches turns on the specific facts and circumstances.

The third argument the State advances is that Gaglione was justified in searching for the vehicle identification number on the Audi. (Resp. at 8-10). It relies on the *Class* case as authority. (Resp. at 9).

Yet, White does not argue that Gaglione was out of line searching for the VIN on the Audi. He agrees that the *Class* case stands for the proposition that police can search for VINs without violating the driver's Fourth Amendment rights. *New York v. Class*, 475 U.S. 106, 115, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986). The reason therefore is since 1969 all VINs are located in plain view from the outside of a vehicle, and can be seen by looking through the windshield. *Id.* at 112. In this regard a law enforcement officer can discover the VIN without searching the inside of the vehicle.

In the case here, Gaglione did have access to the VIN. He wrote the number down, called it into dispatch, and discovered the Audi was last registered in New York. (R39:22, 33, 38). This information proved nothing as the New York registration had expired in 2016 and the temporary plate in the back window showed the temporary Illinois registration had expired in 2018. (R39:42, 17).

But there is no issue here about the VIN. White is not complaining that Gaglione obtained the VIN in violation of his Fourth Amendment rights. The VIN is not an issue.

Next, the State argues that White's passenger, Lloyshonda Gee, may have had apparent authority over the Audi and that Gaglione may have been justified in believing she had authority to consent to his search of the glove compartment. (Resp. Br. at 10-11). If this is so, the State says, there would be no Fourth Amendment violation. (Resp. Br. at 10-11). The State goes on to briefly discuss the "apparent authority doctrine" claiming the doctrine applies to passengers in motor vehicles. (Resp. Br. at 11). It cites to a federal district court case out of Utah for this proposition. (Resp. Br. at 11).

In the federal case, *United States v. Ospina*, 682 F.Supp. 1182 (D. Utah 1988), the district court held that a passenger had apparent authority to authorize the search of the vehicle Ospina was driving. *Id.* at 1185. Under the circumstances there, the passenger, Cantillo, readily retrieved from the glove compartment a valid registration card when asked to do so, consented to the search of the vehicle, and produced a set of keys that would open the trunk. *Id.* at 1183. Cantillo showed particular knowledge about the vehicle, exercised control and dominion over it as evidenced by his opening of the glove box and the trunk without objection from Ospina. *Id.* at 1185. Likewise, Cantillo authorized the vehicle search without any objection from Ospina. *Id.* at 1186. On these facts, the district court found the search to be authorized. *Id.* at 1185.

These facts contrast sharply, however, with White's case. As stated in his brief in chief, Gaglione knew Gee was a guest in White's vehicle because he saw her step off the curb, open the door, and climb into the passenger seat. (R40:25). Upon questioning, White told Gaglione he had recently purchased the vehicle, that he was the owner of it, but had not had time to register it. (R40:17). Gee did not object or refute

White's statements during this questioning, at least Gaglione never mentioned that she did. (R40:17, 34). In fact, at no time did Gee state she was the owner or was anything other than White's guest. (R40:34, 40). Unlike, Cantillo in the *Ospina* case Gee never produced any keys to the trunk or gave Gaglione any other reason to think she was exercising control and dominion over the car. In fact, Gee, a young lady, only opened the glove box after being surrounded by two uniformed police officers who told her to do so. (R40:22, 26, 37).

Equally important is the fact that in *Ospina* neither Ospina nor Cantillo claimed to be the owner of the vehicle Ospina was driving. *Ospina*, 682 F.Supp at 1184. In *Ospina*, the two said they were driving the vehicle from New York to San Francisco at the request of the true owner. *Id.* Therefore, it was far more reasonable for the officer in *Ospina* to believe that neither had a superior right of control over the vehicle. *Id.* at 1186. This important fact is not present in White's case, as White maintained throughout Gaglione's questioning that he was the true owner. (R40:52). Therefore, it hardly follows that Gaglione could reasonably believe that Ms. Gee had apparent authority to authorize the search as was the case in *Ospina*.

B. Gaglione's search was reasonable.

Finally, the State argues that Gaglione's actions were reasonable under the circumstances. (Resp. Br. at 11-13).

During an investigative detention, whether the intrusion is reasonable depends on whether the police conduct is reasonably related to the circumstances justifying the initial police interference. *State v. Gammons*, 2001 WI App 36, ¶11, 241 Wis.2d 296, 625 N.W.2d 628. An investigative detention

must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Id.* The scope of the detention must be carefully tailored to its underlying justification. *Id.* 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.*

The *Gammons* case is helpful in showing why Officer Gaglione's actions were not reasonable under the circumstance in White's case. Like in our case, in *Gammons*, an officer also stopped a vehicle because it did not have a rear license plate. *Id.* ¶2. After identifying those in the vehicle and running a license and warrant check on each individual, the officer then asked the driver if there were any drugs in the vehicle. *Id.* ¶2-3. The driver said there were not. *Id.* ¶3. Even though the officer had no particular reason to suspect he would find drugs in the vehicle, he nonetheless threatened a dog-sniff. *Id.* ¶3. Long story short, the officer conducted a search, drugs were found, and Gammons' drug conviction followed. *Id.* ¶¶4-5.

On appeal, Gammons argued that, even if the officer had reasonable suspicion to stop the vehicle, the officer exceeded the permissible scope of the stop by continuing to detain the vehicle by asking questions about drugs and asking to search the vehicle. *Id.* ¶1. The court of appeals agreed with Gammons. *Id.* ¶299.

In the words of the court, no additional suspicious factors suggesting drug activity developed from the driver's responses to the officer's initial questions. *Id.* ¶24. Therefore, the officer had no basis to continue to detain Gammons and

the others after the driver stated that those in the vehicle did not have any drugs. *Id.* At that point, said the court, the Fourth Amendment required the officer to terminate the stop and allow Gammons and the others to continue about their business. *Id.* At that moment, the stop was transformed into an unlawful detention and any evidence gathered from the subsequent search was obtained in violation of Gammons' Fourth Amendment rights and should have been suppressed. *Id.*

Applying the careful analysis in the *Gammons* case to the facts of this case should net the same result. At the moment White told Gaglione that he had not had time to register the vehicle Gaglione should have terminated the stop. At best, Gaglione should have issued White a ticket for driving an unregistered vehicle and sent him on his way. No additional suspicious factors suggesting the Audi was stolen developed from White's response to the question put to him.

Now the State argues that Gaglione, who had vast experience with investigating stolen and unregistered vehicles, reasonably detained White so he could verify whether White in fact was the owner. (Resp. Br. at 12). Two things can be said about the State's argument. One, Gaglione only had two years of experience investigating stolen vehicles and in this instance his hunch about White's unregistered vehicle being stolen was outright wrong, confirming why the law does not allow hunches to sustain a warrantless search under the Fourth Amendment. (R39:59, 24). Two, whether White owned the vehicle or not is immaterial, because driving a vehicle that one does not own is not a crime, let alone a motor vehicle violation.

Although the State and the trial court both believed it was important that Gaglione ascertained who owned the

Audi, the fact of the matter is who owned it was of no importance. (Resp. Br. at 12; R39:60). Perhaps Gaglione had some interest in determining whether it was stolen, but he already had the means to determine if it was stolen because he obtained the VIN without conducting a search. (R39:22). He had no reason to look inside the glove compartment because the information he wanted – to ascertain whether or not the vehicle was stolen – was available to him without searching inside the glove compartment. By his own admission he did run the VIN and apparently determined that the Audi was not stolen as he never had it impounded. (R39:42).

CONCLUSION

For the reasons stated, Mr. White ask 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 23rd day of October 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 2,359 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 23rd day of October 2020.

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