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05-22-2023
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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001587 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ASHLEY RAE BAKER,

Defendant-Appellant.

On Appeal from an Order Denying Ms. Baker's
Motion to Suppress and a Judgment of Conviction,
Entered in the Sheboygan County Circuit Court, the
Honorable David Borowski, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

Ms. Baker and the state agree the issue for this Court to resolve is whether the state met its burden to establish that probable cause existed to arrest Ms. Baker for possession of marijuana. Importantly, the state concedes Wisconsin enforces a “bright-line rule” that probable cause to arrest or search a driver of a vehicle does not establish probable cause to arrest or search a passenger. (State’s Brief at 13). Thus, as argued in her brief-in-chief, this case comes down to whether the state established anything more than guilt by association. (See Brief at 22-25).

Before replying to the state’s legal arguments about probable cause, Ms. Baker must address three factual disputes that appear to exist between the parties.

First, Ms. Baker adamantly disputes the assertion that “[a]fter a short term visit, [Ms.] Baker was one of two people leaving a residence well known by law enforcement for drug trafficking.” (See State’s Br. at 14 *contra* Baker’s Brief at 18-20). Officer Moore’s testimony was clear, and presumably truthful, in terms of what he observed compared to what he assumed or believed. Officer Moore observed a vehicle arrive on the 1200 block of Huron Avenue. He observed “people” get in the vehicle. He did not observe Ms. Baker arrive or get out of the vehicle. He did not observe Ms. Baker go into or leave one of the two suspected drug houses.

The bottom line, with regard to this issue, is that Ms. Baker was a passenger in a vehicle that was previously parked for roughly 10 minutes in an area alleged to contain two suspected drug houses. The state's assertions that go beyond those uncontested facts are not supported by the record and are not conceded by Ms. Baker.

Second, the state seems to blur the clear line established at the suppression hearing with regard to the circumstances surrounding Ms. Baker's presence outside of the vehicle with her purse when the K9 alerted on the vehicle. (*See* State's Br. at 14, 18-19). Ms. Baker indisputably was not in the vehicle when the K9 alerted. Ms. Baker was never instructed to remain in the vehicle. Ms. Baker was never instructed or ordered to leave her purse in the vehicle. Officer Moore testified to no suspicious or incriminating action taken by Ms. Baker prior to his search of her purse.

Nevertheless, the state attempts to fault Ms. Baker for arguing that the state presented no evidence of Ms. Baker's furtive movements or individualized suspicious conduct that established probable cause to search her purse. To do so, the state argues that Ms. Baker "[m]isstates Officer Moore's testimony." (State's Br. at 18). However, Ms. Baker is not at fault for the *state's* overly specific questioning of Officer Moore at the suppression hearing. It was the state that asked, "Just in seeing or picking up the purse was there anything just in that activity or motion that suggested there was something

potentially illegal or concerning for officer safety inside of it before you actually opened it and looked inside? (*See* State's Br. at 19).

After answering in the negative, Officer Moore then offered that "*typically* when we do have individuals exit the vehicle, we do ask that they leave any belongings inside based off of officer safety because of that." (*See* State's Br. at 19) (emphasis added). However, in this case, there is no evidence that Ms. Baker was instructed to leave her purse in the vehicle. Moreover, the state does not rebut Ms. Baker's argument about a lack of evidence of any specific or articulable reason to believe evidence of a crime would be found in Ms. Baker's purse.

Instead, the state merely asserts that when Ms. Baker exited the vehicle with her purse she evidenced "consciousness of guilt." (State's Br. at 19). So, not only does the state fail to rebut Ms. Baker's claim of a lack of evidence concerning particularized suspicion regarding Ms. Baker's purse, but it asserts without evidence that Ms. Baker removing her purse from a vehicle in which she was merely a passenger, and absent any evidence of commands or instructions to the contrary, supports probable cause to arrest. Simply put, no evidence supports the state's argument on this point. Because it is the state's burden to establish probable cause, Ms. Baker is free to highlight the lack of evidence. On the other hand, the state is not free to argue from evidence that was not presented.

Third, the state disputes Ms. Baker's characterization of the traffic stop that occurred in this case as "pretextual." (State's Br. at 16). However, a pretextual traffic stop is a well-recognized term used in the caselaw to describe a "brief detention of a motorist who police have probable cause to believe has violated a traffic law...even if the officer would not have initiated the stop without some additional law enforcement objective." *See State v. Houghton*, 2015 WI 79, ¶25, 364 Wis. 2d 234, 868 N.W. 2d 143 (citing *Whren v. United States*, 517 U.S. 806, 808, 818-19 (1996)). Under *Whren*, pretextual traffic stops are not unconstitutional.

Ms. Baker did not and does not challenge the stop merely because it objectively appears to have been pretextual. That characterization is simply a recognition of the undisputed facts and testimony of Officer Moore. The Officer testified that he was "watching" the 1200 block of Huron Avenue based on information that two homes in the area were engaged in drug trafficking. Officer Moore also testified that he has on prior occasions initiated stops of vehicles after short-term visits to one of these two drug houses. (26:12-13; App. 8-9). Further, he observed a vehicle arrive on the block, leave shortly thereafter, and he then followed and stopped the vehicle after identifying a vehicle equipment violation. Officer Moore had an objectively reasonable basis to conduct a traffic stop, but that is not inconsistent with the officer's suspicion of drug activity that motivated the stop.

Ultimately, what matters is whether the state presented evidence that transformed Officer Moore's suspicion into probable cause that Ms. Baker possessed marijuana prior to his search of her purse.

Having addressed the parties' factual disputes, the issue remains whether the state established probable cause to arrest Ms. Baker for possession of marijuana. Ms. Baker's argument is simple: probable cause existed to arrest the driver of the vehicle, Mr. Porter, but no individualized evidence was presented that separately established probable cause to arrest Ms. Baker. Instead, law enforcement searched Ms. Baker's purse simply as a matter of course because she was a passenger in a vehicle in which drugs were found.

The state recognizes the bright-line rule that applies in Wisconsin: the lawful arrest of the driver does not create probable cause to arrest a passenger. In other words, probable cause cannot be established simply by association. In order to address the evidence presented by the state that is specific and individualized to Ms. Baker, it is necessary to clarify what the state did not present.

First, the state did not present evidence that Ms. Baker entered or left a suspected drug house. The state merely presented evidence that Ms. Baker entered a vehicle that parked in an area where two homes were suspected to be engaged in drug trafficking.

Second, the state did not present any evidence that Ms. Baker acted suspicious, made any incriminating statements, emitted an odor of marijuana, or that she did anything to give law enforcement a specific and articulable basis to think *she* possessed marijuana.

Third, the state did not present any evidence that Mr. Porter pointed the finger at Ms. Baker. While Officer Moore, the circuit court, and the state seem disinclined to accept Mr. Porter's statements as the truth, any doubt about the ultimate truth of Mr. Porter's statements does not amount to evidence against Ms. Baker.

Further, contrary to the state's arguments that suspects frequently take the fall or make admissions in order to prevent discovery of additional evidence, it is undeniable that any sort of denial or refusal to accept responsibility from Mr. Porter or lack of clarity that the drugs were his would have supported probable cause to believe Ms. Baker possessed marijuana. Rather than deal with a lack of evidence, the state attempts to concoct evidence against Ms. Baker from clear probable cause to arrest Mr. Porter. Again, though, suspicion of Mr. Porter does not transfer by association to Ms. Baker.

So, what evidence did the state present that purports to establish probable cause to believe Ms. Baker possessed marijuana? The short answer is very little. Ms. Baker was a passenger in a car that had briefly parked in an area near two suspected

drug houses. Also, she was the passenger in a vehicle in which .6 grams of marijuana and marijuana shake were found. However, no evidence was specifically linked to Ms. Baker's passenger seat or area and the K9 alert on the vehicle occurred well after Ms. Baker and her purse were removed from the vehicle.

There is no getting around the only explanation for why Ms. Baker's purse was searched. She was deemed guilty by association with Mr. Porter. While that common-sense conclusion explains why Officer Moore searched Ms. Baker's purse without asking Ms. Baker a single question, Ms. Baker's association with Mr. Porter or her prior presence in an area that contained two suspected drug houses does not amount to probable cause that she possessed marijuana.

CONCLUSION

For the reasons argued above and as previously argued in her brief-in-chief, Ms. Baker respectfully requests that this Court reverse the circuit court's order denying her motion to suppress and vacate her judgment of conviction as the evidence obtained as a result of the illegal search of her pursue must be suppressed and without it there is no evidence against Ms. Baker.

Dated this 22nd day of May, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,630 words.

Dated this 22nd day of May, 2023.

Signed:

Electronically signed by

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