COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2828-CR **Cir. Ct. No. 2007CM288**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LELAND L. MELLUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Reversed and cause remanded for further proceedings*.

¶1 LUNDSTEN, J.[1] Leland Mellum appeals a circuit court judgment convicting him of possession of THC. He challenges the circuit court's decision

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

denying his motion to suppress evidence that resulted from a protective search for weapons. We agree with Mellum that, under ***State v. Mohr***, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186, the court should have granted the motion. We reverse the judgment and remand to the circuit court for further proceedings.

Background

¶2 The relevant facts are undisputed and come from the arresting officer's testimony at the suppression hearing.

¶3 At approximately 2:00 a.m. on July 4, 2007, the officer initiated a traffic stop of a vehicle for speeding in downtown Muscoda. When asked if the area of the stop was known for heavy crime, the officer responded, "None that I am aware of, no."

¶4 The vehicle made no attempt to evade the officer. The officer made contact with the vehicle's three occupants, identified them, ran them through dispatch, and found no outstanding warrants. One of the vehicle's passengers was the defendant, Mellum.

¶5 The officer performed field sobriety tests on the driver and arrested her for operating while intoxicated. During the approximately twenty-four minutes between the initial stop and the driver's arrest, the passengers in the vehicle were compliant and there were no suspicious activities.

¶6 The officer asked the passengers to exit the vehicle while he searched it. Mellum and the other passenger complied. The other passenger asked the officer if he could leave, and the officer said yes. Mellum remained at the scene with a fourth individual who had walked up during the driver's field sobriety tests and agreed to be the driver's "responsible party."

¶7 Mellum did not engage in any aggressive behavior, showed no signs of overt nervousness, and did not appear agitated. Mellum was wearing a vest made of relatively thin material, and the officer observed no suspicious bulges. The officer observed nothing unusual about Mellum's demeanor, except that Mellum kept putting his hands into his vest pockets. The officer told Mellum two or three times to remove his hands from his pockets for the officer's safety. When Mellum again put his hands back in his pockets, the officer decided to pat Mellum down for weapons.

¶8 The officer told Mellum he would be patted down and directed Mellum to face away from him. When Mellum turned around, the officer noticed a plastic bag sticking out of one of Mellum's vest pockets. Mellum had been facing the officer, and the bag was not visible to the officer until Mellum turned around. The bag contained green plant material that the officer believed to be marijuana. The officer arrested Mellum, searched his person, and found another bag of what appeared to be marijuana.

¶9 In denying Mellum's motion to suppress, the circuit court reasoned that the officer had no reasonable choice but to frisk Mellum when Mellum failed to comply with the officer's directive that Mellum keep his hands out of his pockets. The court viewed Mellum's lack of compliance as interfering with the officer's investigation of the driver by failing to obey a lawful order. In the circuit court's view, this justified the frisk. The court acknowledged that ***Mohr*** and ***State v. Kyles***, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449—two cases in which courts deemed unreasonable a frisk of a suspect who put his hands in his pockets contrary to a police directive—were "pretty hard to distinguish." The court concluded, however, that there was other case law to the contrary and that ***Mohr*** and ***Kyles***

could be distinguished because Mellum, unlike the defendants in ***Mohr*** and ***Kyles***, was free to leave during the time leading up to the frisk.

Discussion

¶10 Because the facts are not in dispute, we review *de novo* the circuit court's conclusion that the circumstances supported a protective weapons search of Mellum. *See* ***Mohr***, 235 Wis. 2d 220, ¶11. The applicable standard is objective: whether a reasonable officer, under all the circumstances presented, was "justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." ***Terry v. Ohio***, 392 U.S. 1, 24 (1968); *see also* ***Kyles***, 269 Wis. 2d 1, ¶10. Stated more succinctly, the officer must possess a reasonable suspicion that the person to be frisked is presently armed and dangerous.

¶11 Mellum argues that, under ***Mohr*** and ***Kyles***, the circuit court should have granted his motion to suppress. We conclude that, under ***Mohr***, the frisk here was not supported by reasonable suspicion. Accordingly, we find it unnecessary to discuss the less comparable case, ***Kyles***.

¶12 In ***Mohr***, police stopped a speeding vehicle at approximately 1:00 a.m. after it crossed the center line and drove straight through a left turn lane. ***Mohr***, 235 Wis. 2d 220, ¶2. The vehicle contained four occupants including the driver, and the officer detected a strong odor of intoxicants coming from inside. ***Id.***, ¶3. After confirming that the driver was not intoxicated but that an underage passenger was intoxicated, the officer approached another passenger, Mohr. ***Id.***, ¶¶4-6. By this time, three officers and squad cars were on the scene. ***Id.***, ¶5.

¶13 The officer asked Mohr to exit the vehicle "for officer safety," and Mohr complied. ***Id.***, ¶6. The officer noticed that Mohr stumbled as he exited and that he smelled strongly of intoxicants. ***Id.*** Mohr refused the officer's request that Mohr sit in one of the squad cars. ***Id.*** Mohr stated that he wanted to go home and that he lived two blocks away, but the officer would not allow Mohr to leave and told Mohr he should wait for his identification to be confirmed. ***Id.***

¶14 Mohr put his hands inside his pockets and became "really resistive." ***Id.*** For officer safety reasons, the officer asked Mohr to remove his hands from his pockets, but Mohr refused. ***Id.*** The officer repeated the request because he did not know what was in Mohr's pockets and because Mohr was acting nervous and resistive. ***Id.***, ¶7. Once again Mohr refused, leading the police to handcuff Mohr, frisk him, and discover marijuana on his person. ***Id.***, ¶¶7-8.

¶15 We concluded that the frisk in ***Mohr*** was unlawful because it was unsupported by a reasonable suspicion that Mohr was a danger to the police. ***Id.***, ¶¶1, 15, 18. We considered the totality of the circumstances, including the fact that approximately twenty-five minutes had elapsed between the initial traffic stop and the frisk:

> Having reviewed all of the facts and circumstances set forth in the record, we conclude that the frisk was unreasonable because the officer could not have objectively thought that Mohr was dangerous. The officer testified that the frisk was done for his safety and because Mohr refused to take his hands out of his pockets, but when this evidence is considered along with the fact that the frisk occurred approximately twenty-five minutes after the initial traffic stop, the most natural conclusion is that the frisk was a general precautionary measure, not based on the conduct or attributes of Mohr.

Id., ¶15. We further explained:

> *Although Mohr appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give the officer a reasonable suspicion that Mohr was dangerous, especially when the officer had spent the previous twenty minutes at the scene without any suspicious incidents.* Additionally, it is clear that backup units were on the scene, which obviated the officer's need to frisk Mohr before the vehicle search could proceed. We cannot agree that a reasonably prudent person in the officer's position would believe that his or her safety was in danger.

Id., ¶16 (emphasis added).

¶16 The facts here are similar to those in ***Mohr***. In both situations, there was a traffic stop during the early morning hours involving three or four occupants and suspicion of an intoxicated driver. *See* ***Mohr***, 235 Wis. 2d 220, ¶¶2-4. Neither case involved a high crime area or evasive behaviors by the vehicle. In both cases, the defendant was asked to exit the vehicle and subsequently failed to fully comply with a police directive to remove his hands from his pockets. *See* ***id.***, ¶¶6-7. In both cases, police frisked the defendant approximately twenty-five minutes after the initial vehicle stop. *See* ***id.***, ¶15.

¶17 We agree with Mellum that the differences between his case and ***Mohr*** weigh in favor of Mellum. In ***Mohr***, there was strong evidence that the defendant was intoxicated, *see* ***id.***, ¶6; here, there is no clear indication whether Mellum was intoxicated. Mohr was "acting nervous," *see* ***id.***, ¶7; Mellum, in contrast, showed no signs of overt nervousness. Mohr was repeatedly and continuously uncooperative, and described by an officer as "really resistive," *see* ***id.***, ¶¶6-7; Mellum did not engage in any aggressive behavior and did not appear agitated.

¶18 As indicated above, the circuit court acknowledged that ***Mohr*** was "pretty hard to distinguish," but relied on case law going "the other way." In

particular, the court relied on ***State v. McGill***, 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795. The State, which fails to address ***Mohr***, also relies on ***McGill***. We are not persuaded.

¶19 In ***McGill***, an officer observed a vehicle traveling on a closed road at approximately 10:10 p.m. and activated his squad car emergency lights in pursuit of the vehicle. ***McGill***, 234 Wis. 2d 560, ¶¶2-4. Rather than immediately stopping, the driver continued down the road, turned a corner, and parked in a private driveway. ***Id.***, ¶¶4-5, 27. The driver, McGill, got out of the car and began walking away as if he were "trying to avoid being with [the] vehicle or being stopped by the police." ***Id.***, ¶5; *see also* ***id.***, ¶28. Additionally, the officer described McGill as "unusually nervous—beyond the level of nervousness that the officer normally observed in individuals he stopped," and as "smell[ing] of intoxicants and illegal drugs." ***Id.***, ¶¶29, 31; *see also* ***id.***, ¶7. The officer also testified that McGill "'twitched and acted nervous with his hands.'" ***Id.***, ¶31. In considering these and other relevant circumstances, the supreme court concluded that a reasonable officer could believe that McGill was armed and presently dangerous. ***Id.***, ¶33.

¶20 It was plainly relevant to the court's decision in ***McGill*** that McGill was under the influence, was unusually nervous, "twitched and acted nervous with his hands," and engaged in evasive behaviors not ordinarily associated with a routine traffic stop. *See* ***id.***, ¶¶31-33. None of those facts are present here, with the possible exception that Mellum may have been intoxicated.

¶21 For similar reasons, we are not persuaded by the State's reliance on ***State v. Williamson***, 113 Wis. 2d 389, 335 N.W.2d 814 (1983). ***Williamson*** is even more readily distinguished from this case than ***McGill***. In ***Williamson***, the

defendant was frisked during the early morning hours after an officer became aware that a man with the defendant was "wanted" and had previously been convicted for carrying a weapon. ***Williamson***, 113 Wis. 2d at 402-04. This fact, when considered with other suspicious factors present in ***Williamson***, renders the case of limited assistance here. *See* ***id.***

¶22 The circuit court here reasoned that the officer had no other reasonable choice when Mellum failed to comply with the officer's directive. The court viewed Mellum's lack of compliance as interfering with or obstructing the officer's investigation of the driver. Although we acknowledge that this reasoning has common sense appeal, we are bound by ***Mohr***. Moreover, the question is not whether Mellum's hands-in-pockets activity could be deemed to be interfering or obstructing. Rather, the question is whether the totality of the circumstances could justify a reasonable officer's conclusion that Mellum was armed and dangerous. ***Mohr*** dictates that the answer to that question is no.

¶23 The circuit court also reasoned that ***Mohr*** and ***Kyles*** could be distinguished "because they aren't situations where somebody who is aware that they are free to go voluntarily chooses to stay and then interferes with the officer's performance of his duties. So I don't know that those individuals would be subject to potential obstruction charges." The court was referring to its determination that Mellum, unlike Mohr and the defendant in ***Kyles***, was free to leave the scene at the time he was putting his hands in his pockets contrary to the officer's directive. The court apparently based this determination on the fact that the officer had by that time allowed the other passenger here to leave the scene at the other passenger's request.

¶24 We will assume, without deciding, that the circuit court correctly determined that Mellum was free to leave when Mellum was putting his hands in his pockets. However, it is not apparent why an arrested driver's passenger who voluntarily stays on the scene of a drunk driving arrest poses a greater risk than a passenger who is required to remain.

¶25 Our resolution of this case on the question of reasonable suspicion for a protective search means that we must also reject the State's undeveloped "plain view" argument. There is no dispute that the officer did not see the bag of marijuana in Mellum's pocket until Mellum submitted to the officer's order to turn around for purposes of the frisk. Because the officer lacked the necessary justification at that point in time, the plain view doctrine does not apply. *See* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992) ("plain view" doctrine requires that the officer had prior justification for being in the position to discover the evidence in plain view).

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.