

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2953-CR

Cir. Ct. No. 2010CM4194

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNIE AUSTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Johnnie Austin appeals the judgment convicting him of carrying a concealed weapon, contrary to WIS. STAT. § 941.23 (2009-10),²

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and the postconviction order denying his request for expungement of his conviction. Austin argues that the trial court erred in denying his motion to suppress because it based its decision on insufficient facts and an improper application of the Fourth Amendment. Additionally, Austin argues that the trial court erred in denying his request for expungement because it based its decision on irrelevant and improper factors. This court disagrees with Austin's contentions and affirms.

BACKGROUND

¶2 Austin initially drew the attention of Milwaukee Police Officers Erin Tisher and Joel Panning because he was illegally parked. Austin had stopped his car along West Stark Street to pick up his nephews to play basketball, and had parked his car on an angle such that it was obstructing traffic. Austin claimed that he planned to park the car legally when he realized he had to wait for one of his nephews to run back into the house to get something; however, Officer Tisher approached him before he was able to do so.

¶3 Officer Tisher approached Austin, who was still in his car, and explained that she stopped him because of the way he was parked and requested that he produce identification. As Austin removed his identification from his wallet, Tisher observed that Austin's hands were shaking and that his head was tilted downwards as if he was avoiding eye contact with her.

² 2011 WIS. ACT 35 modified Wisconsin's laws to permit licensed persons to carry concealed weapons. *See* 2011 WIS. ACT 35, § 38 (creating WIS. STAT. § 175.60(2g); § 54 (creating WIS. STAT. § 941.23(2)(d); §101 (With exceptions not material here, the "act takes effect on the first day of the 4th month beginning after publication," which was July 22, 2011.).

¶4 Due to Austin's visible nervousness, as well as the fact that they were in a high-crime neighborhood, Officer Tisher suspected that Austin might be trying to conceal something. Based upon her training and experience, a lack of eye contact and nervousness from a driver who has been pulled over often indicates that the person is concealing a firearm or illegal narcotics inside a vehicle. Tisher also described the area where she had stopped Austin as a high-crime area due to the numerous aggravated assaults, firearm assaults and narcotics offenses that occur there. To dispel her suspicions, Tisher asked Austin if he had anything illegal inside the vehicle, to which he responded negatively.

¶5 Still concerned that Austin was concealing something, Officer Tisher asked Austin to step out of the vehicle. As Austin got of his car and began walking to the rear of the vehicle, Officer Tisher again asked Austin if there was anything illegal in the vehicle that she should worry about. Austin responded, "no, there's not anything illegal, but I do have a firearm in the car." A firearm was recovered from the glove box and Austin was charged with one count of carrying a concealed weapon.

¶6 Austin filed a motion to suppress the gun, which the the trial court denied. Austin then pled guilty to the concealed weapon charge and was sentenced.

¶7 At sentencing, Austin requested, among other things, that the court order expungement of the conviction pursuant to WIS. STAT. § 973.015(1)(a).³ The trial court denied Austin's request for expungement, concluding:

[W]ith regard to expungement, I think I'm giving him quite a bit of break here in terms of the probation and in terms of the sentence. I do think that the charge should not be expunged. Under all the circumstances, I think that it is something that society should be aware that it was there.

If he does stay out of trouble in the future, it's not going to be that much of a problem for him. If he does get into trouble, it's very important that everybody know that's been there and that people should be aware of that.

¶8 Austin subsequently filed a postconviction motion requesting sentence modification on the grounds that the trial court erroneously exercised its discretion in denying Austin's request for expungement. Austin explained that he believed that the trial court denied his request because it assumed that the expungement would erase Austin's conviction, and argued that the trial court's reasoning was incorrect because although the court file is sealed, the criminal conviction still remains in the record with the Department of Justice (DOJ).

³ WISCONSIN STAT. § 973.015(1)(a) provides, in pertinent part:

Subject to par. (b) and except as provided in par. (c), when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.

¶9 The trial court denied Austin’s motion, stating:

While the defendant is correct that an expungement does not affect DOJ records, the public has to pay for a search of DOJ records, whereas the Wisconsin Circuit Court Access website is available to the public (and prosecutors) at no cost. Consequently, the court finds that to grant an expungement on the basis that the conviction is discoverable through a search of DOJ records would place an unnecessary burden on the public and frustrate the court’s intent that the conviction “is something that society should be aware that it was there.” It would also interfere with future prosecutions, since evidence of an expunged conviction is not admissible to attack the credibility of a witness.

(Citation omitted.) Austin now appeals. Additional facts will be developed as necessary.

ANALYSIS

¶10 Austin makes two arguments on appeal. First, Austin argues that the trial court erred in denying his motion to suppress because: (a) Officer Tisher did not have reasonable suspicion to continue detaining him; and (b) the trial court did not balance the public’s interest in safety against Austin’s liberty interest as required by the Fourth Amendment. Second, Austin argues that the trial court erred in denying his request for expungement because the trial court based its decision on improper factors. This court discusses each argument in turn.

(1) The trial court correctly denied Austin’s motion to suppress.

¶11 While Austin accepts the trial court’s determination that the initial traffic stop by Officer Tisher was reasonable, and thus, not a Fourth Amendment violation, he argues that the trial court erred in denying his motion to suppress because Tisher did not have reasonable suspicion to continue her detainment of

him. Austin additionally argues that the trial court erred in denying his motion to suppress because it failed to correctly apply the Fourth Amendment balancing test when analyzing Tisher's actions.

¶12 This court reviews a motion to suppress using a two-part analysis. *See State v. Hess*, 2010 WI 82, ¶19, 327 Wis. 2d 524, 785 N.W.2d 568. "First, we uphold the [trial court]'s findings of historical fact unless they are clearly erroneous." *See id.* Second, this court independently applies the applicable constitutional principles to those facts. *See id.*

(a) *The trial court properly found that Officer Tisher's continued detention of Austin was reasonable.*

¶13 Austin argues that the trial court erred in finding that Officer Tisher's suspicions and continued detention of Austin were reasonable because Officer Tisher could not have logically concluded from her observations that Austin had a weapon in the vehicle. According to Austin, because he had a valid driver's license, he should have been merely cited for illegally parking and released.

¶14 This court disagrees; the trial court properly found Officer Tisher's continued detention of Austin reasonable. If, during a valid traffic stop, an officer becomes reasonably suspicious of an individual, the officer need not automatically terminate the encounter, *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1; indeed, if the officer becomes aware of additional circumstances giving rise to an inference that the driver has committed or is committing a crime from that prompting the initial stop, the officer may extend the stop for further investigation, *see State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. This is exactly what occurred in Austin's case. Officer Tisher

observed Austin staring at his steering wheel during their conversation, and noticed that his hands were shaking when he handed his identification to her. *See State v. Sumner*, 2008 WI 94, ¶38, 312 Wis. 2d 292, 752 N.W.2d 783 (a suspect's unusual nervousness is a legitimate factor to consider in evaluating an officer's reasonableness during a search or seizure). In addition, Tisher stopped Austin in a dangerous neighborhood with a known history of drug and weapon offenses. Under these circumstances, it was appropriate for Tisher to continue to detain Austin. Furthermore, as the State correctly points out, once Austin was ordered out of his car, he told Tisher that he had a gun inside. Thus, at that point, Officer Tisher had reasonable suspicion that Austin had committed a crime as well as probable cause to search the vehicle for the weapon. *See Colstad*, 260 Wis. 2d 406, ¶19.

(b) *The trial court correctly and completely analyzed Officer Tisher's actions under the Fourth Amendment.*

¶15 Austin also contends that the trial court erred in finding Officer Tisher's actions reasonable because it failed to balance the public's interest in safety against his liberty interest as required by the Fourth Amendment. According to Austin, the trial court noted that the Supreme Court in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), established a *per se* rule that an officer may order a person out of his or her vehicle if the stop is for a valid traffic violation and consequently determined that Tisher's stop was reasonable, but ended its analysis there. The court should have, according to Austin, continued to the "second part of the required analysis," which, as noted, would have been to balance the public's safety interest against his liberty interest.

¶16 This court disagrees. Contrary to what Austin’s argument implies, *Mimms* does in fact incorporate a balancing of the public’s safety interest against an individual’s liberty interest. *See id.* at 109-11 (“[W]e look first to that side of the balance which bears the officer’s interest in taking the action that he did.... Against this important interest we are asked to weigh the intrusion into the driver’s personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car.”) Moreover, the trial court did weigh these two competing interests in Austin’s case. It explained that Officer Tisher did not immediately request Austin to exit his vehicle:

In Pennsylvania versus Mimms at 434 U.S. 106, a 1977 case, the Supreme Court established a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation. Here, the officer, in conducting the traffic stop, did not do that immediately but, instead, she asked the driver for identification[,] which is appropriate. She advised the driver why he was being stopped. It’s ... for a parking ticket.

The trial court also considered additional facts justifying Austin’s continued detention, including Austin’s nervousness, which was disproportionate to the situation; Officer Tisher’s police training and experience; and the concerns for police officers’ safety in general. The trial court reasoned it was “not a single factor but an accumulation of items” that determined the reasonability of Officer Tisher’s actions. In other words, the trial court examined the totality of the circumstances to find that Officer Tisher’s actions were reasonable. *See Sumner*, 312 Wis. 2d 292, ¶20.

¶17 In sum, the trial court properly found Officer Tisher’s continued detention of Austin reasonable, and it doing so it properly analyzed and applied

the constitutional principles of the Fourth Amendment. Therefore, this court affirms the trial court's denial of Austin's motion to suppress.

(2) The trial court properly exercised its discretion at sentencing.

¶18 Austin additionally argues that the trial court's denial of his request for expungement was based on irrelevant and improper factors. At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *State v. Gallion*, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. See *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. See *Gallion*, 270 Wis. 2d 535, ¶41.

¶19 The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, this court follows “a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” See *id.*, ¶18 (citation omitted). Our analysis includes consideration of postconviction orders denying motions for sentence modification, because a trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶20 This court concludes that the trial court properly exercised its discretion with regard to Austin's sentence. The trial court explained that the seriousness of carrying a loaded weapon outweighed the positive aspects of Austin's character. Specifically, in determining Austin's sentence, the trial court discussed the seriousness of the offense: it was a Class A misdemeanor, the most serious type of misdemeanor; the gun's magazine was loaded and inserted into it; on the other hand, Austin bought the gun legally and cooperated with police by telling Officer Tisher that he had it. The trial court then discussed Austin's character: Austin was attending classes at UW-Milwaukee full time while working part time and being involved with his church, he did not have a prior record, and this incident was isolated. Finally, the trial court considered the need to protect the public, explaining that it did not want to encourage individuals to carry weapons in their glove compartments.

¶21 While Austin alleges that the trial court erred in denying his expungement request because it relied on the allegedly inaccurate fact that a Department of Justice record would place an undue burden on the public, he does not sufficiently support his argument. Austin claims that "the difficulty with the [trial court]'s position is limited by the terms of CCAP itself;" he then lists, without citation, ways in which he claims data available on CCAP is limited. Austin's brief insufficiently explains the connection between the CCAP terms listed in his and the trial court's ruling. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (This court will not consider inadequately developed arguments.). This court concludes that it is clear from the trial court's sentencing analysis and decision that it weighed the benefit expungement would have had on Austin against the harm it would cause society if it were granted. For example, the court explained:

[W]ith regard to expungement, I think I'm giving him quite a bit of break here in terms of the probation and in terms of the sentence. I do think that the charge should not be expunged. Under all the circumstances, I think that it is something that society should be aware that it was there.

If he does stay out of trouble in the future, it's not going to be that much of a problem for him. If he does get into trouble, it's very important that everybody know that's been there and that people should be aware of that.

¶22 The court also explained, in denying Austin's postconviction motion:

While the defendant is correct that an expungement does not affect DOJ records, the public has to pay for a search of DOJ records, whereas the Wisconsin Circuit Court Access website is available to the public (and prosecutors) at no cost. Consequently, the court finds that to grant an expungement on the basis that the conviction is discoverable through a search of DOJ records would place an unnecessary burden on the public and frustrate the court's intent that the conviction "is something that society should be aware that it was there." It would also interfere with future prosecutions, since evidence of an expunged conviction is not admissible to attack the credibility of a witness.

(Citation omitted.)

¶23 This court therefore concludes that find that the trial court did properly exercise its discretion, both with respect to the sentence and the decision to deny expungement. *See, e.g., Gallion*, 270 Wis. 2d 535, ¶¶17-18. Therefore, this court affirms the trial court's denial of Austin's expungement request.

By the Court.—Judgment and order affirmed.

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

