COURT OF APPEALS
DECISION
DATED AND RELEASED

May 6, 1997

NOTICE

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

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

No. 96-0854-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

John E. Kehler,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. John E. Kehler appeals from the judgment of conviction, following a jury trial, for possession with intent to deliver cocaine and failure to acquire tax stamp. Kehler argues that the trial court erred in denying his motion to suppress the cocaine found in his automobile and in limiting his cross-examination of a state witness

regarding consent to search his automobile. We affirm on these two issues. Because the supreme court recently struck down the drug tax stamp law as unconstitutional,[1] we also reverse and remand, instructing the trial court to vacate the drug tax stamp law conviction.

I. FACTUAL BACKGROUND

On September 22, 1995, Detective Darrell Fischer and Deputy Rodney Richards of the Milwaukee County Sheriff's Department Drug Enforcement Unit stopped Kehler's automobile for two reasons. First, Kehler did not have Wisconsin license plates, but a license plate reading "Salentine Buick."[2] Second, they had information that Kehler was transporting cocaine. After following Kehler for a short time, they pulled him over. Deputy Richards approached the car, asked Kehler for a driver's license, and told him that he was stopped for not having Wisconsin license plates. The parties agree that Kehler produced a driver's license, but Kehler claims that he offered to show Deputy Richards proof of title and vehicle registration, while Deputy Richards claims that Kehler did not.[3] The trial court concluded that the lack of Wisconsin license plates was a "legitimate purpose" for stopping Kehler's automobile.

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[1] In ***State v. Hall***, 207 Wis.2d 54, 67-68, 557 N.W.2d 778, 783 (1997), the supreme court provided three reasons for holding the drug tax stamp law unconstitutional: (1) it unconstitutionally compelled self-incrimination; (2) the confidentiality provision failed "to provide protection coextensive with the privilege"; and (3) the statute could not be construed to provide constitutional protection.

Since the parties submitted their briefs before the supreme court decided ***Hall***, we permitted the parties to file letter briefs regarding ***Hall'***s impact on the drug stamp tax conviction.

[2] The trial court noted that this was neither a "license applied for" plate nor an auto dealer plate, but "a piece of cardboard that says Salentine Buick." Although the trial court noted that Kehler did not have "license applied for" plates, Kehler incorrectly characterizes the plates as such in his brief.

[3] Kehler contends that Deputy Richards rejected his offer to show proof of title and registration.

At the suppression hearing, Deputy Richards testified that he asked Kehler to step out of the vehicle for "safety" reasons. He also stated that in response to his questioning, Kehler denied that he had any weapons, money or drugs. According to Deputy Richards, within two minutes of the stop, he asked Kehler to consent to a search of his automobile, and Kehler consented.[4] By contrast, Kehler contends that he refused each of Deputy Richards's five requests for consent to search the automobile. Detective Fischer testified that during the search of Kehler's automobile, he looked in a toilet case, disassembled a deodorant stick, and found cocaine. Detective Fischer then arrested Kehler. Characterizing the consent issue as a "question of relative credibility," the trial court found Deputy Richards's testimony more credible than Kehler's and ruled that consent to search the automobile was "freely given" without limitation. Additional facts will be discussed in the balance of this opinion.

II. ANALYSIS

A. Constitutionality Of The Stop

Kehler first argues that the stop for lacking Wisconsin license plates was pretextual and that the scope of his detention was unlawful. Under ***State v. Griffin***, 183 Wis.2d 327, 515 N.W.2d 535 (Ct. App.), *cert. denied*, 115 S. Ct. 363 (1994), Kehler insists, the detention should have ended when Kehler "showed Deputy Richards his driver's license and proof of title and registration."[5] Kehler also argues that Deputy Richards should not have removed him from his vehicle, placed him "in custody," or

[4] Detective Fischer also testified at the suppression hearing that he heard Kehler consent to the search.

[5] Kehler acknowledges that ***Griffin*** allows officers to stop cars without Wisconsin license plates. *See* ***State v. Griffin***, 183 Wis.2d 327, 329, 515 N.W.2d 535, 536 (Ct. App.), *cert. denied*, 115 S. Ct. 363 (1994), (holding that a "license applied for" plate, rather than a Wisconsin license plate, together with the inferences that can be drawn from that fact, justify stopping a motor vehicle).

asked him if he had any weapons, money, or drugs. He contends that his lack of Wisconsin license plates "was merely a pretext to stopping him in order to search for narcotics" and that we should not allow standards under ***Griffin*** "to be circumvented and abused by law enforcement officials as a pretext to warrantlessly search a vehicle when they lack any semblance of probable cause." We reject Kehler's arguments and hold that both the stop and the scope of the detention were lawful.

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution both guarantee the right of citizens to be free from unreasonable searches and seizures. ***State v. Gaulrapp***, 207 Wis.2d 598, 603 n.2, 558 N.W.2d 696, 698 n.2 (Ct. App. 1996). "The Wisconsin Supreme Court follows the United States Supreme Court's interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the state constitution." ***Id.*** Under the Fourth Amendment, the temporary detention of individuals during a traffic stop "constitutes a 'seizure' of 'persons.'" ***Whren v. United States***, 116 S. Ct. 1769, 1772 (1996).

To determine if a stop is reasonable, we look at the totality of the circumstances. *See* ***Griffin***, 183 Wis.2d at 331, 515 N.W.2d at 537. Given that traffic stops are seizures of persons, a traffic stop must be reasonable under the circumstances, but generally, as in this case, police may reasonably stop an automobile if they have "probable cause to believe that a traffic violation has occurred." ***Whren***, 116 S. Ct. at 1772. Further, the reasonableness of traffic stops under the Fourth Amendment does not depend on the police officer's actual motivations as "[s]ubjective intentions play no role

in ordinary, probable-cause Fourth Amendment analysis."[6] ***Id.*** at 1774. By contrast, the test is objective and asks whether the police "have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554, *cert. denied*, 484 U.S. 979 (1987).

In reviewing a trial court's denial of a suppression motion, we will uphold the trial court's findings of fact unless the findings are clearly erroneous. Section 805.17(2), STATS.;[7] ***State v. Harris***, 206 Wis.2d 242, 249, 557 N.W.2d 245, 248 (1996). Whether the facts meet the Fourth Amendment's constitutional requirement of reasonableness constitutes a question of law subject to *de novo* review. ***Id.*** Although we use a *de novo* standard of review on appeal for determinations of probable cause and reasonable suspicion, we "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[8] ***Ornelas v. United States***, 116 S. Ct. 1657, 1663 (1996).

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[6] In effect, the ***Whren*** court held that the question of pretext no longer exists, noting for example, that although the Constitution forbids selective law enforcement based on race, the constitutional objection for "intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." ***Whren v. United States***, 116 S. Ct. 1769, 1774 (1996).

[7] Section 805.17(2), STATS., provides, in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

[8] While Kehler correctly notes that, under ***Ornelas***, determinations of probable cause and reasonable suspicion should be reviewed *de novo*, the State correctly points out that the holding was qualified:

> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Under Wisconsin law, the lack of Wisconsin license plates on a vehicle warrants an officer to stop a vehicle. ***Griffin***, 183 Wis.2d at 331, 515 N.W.2d at 537. Once a police officer has lawfully detained an automobile for a traffic violation, "'the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures.'" ***Maryland v. Wilson***, 117 S. Ct. 882, 885 (1997) (quoting ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 n.6 (1977)).[9] Under § 968.24, STATS., the officer may detain the suspect temporarily to ascertain whether the suspect has committed a crime. The trial court noted that "the officer can't tell from looking at the vehicle when the license was allegedly applied for or just what the nature of the application is. Clearly under ***Griffin***[, the] officers had a right to stop the vehicle."

Because ***Griffin*** allowed the police officers to lawfully stop Kehler for lack of Wisconsin license plates, the "additional intrusion" of asking Kehler to step out of the vehicle was *de minimus* and therefore did not violate the Fourth Amendment's proscription against unreasonable search and seizures. *See* ***Wilson***, 117 S. Ct. at 885. For purposes of the Fourth Amendment analysis in this case, the officers' subjective motivations for the stop are irrelevant; the lack of Wisconsin license plates provided an

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> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.

Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996).

[9] The Supreme Court noted that once the officer has validly stopped the vehicle for a traffic violation, the "additional intrusion of asking" a person to step out of the car is "'de minimus.'" ***Maryland v. Wilson***, 117 S. Ct. 882, 885 (1997) (quoting ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977)).

objective indication that a traffic violation had occurred.[10] When the officers have an objective, lawful basis for the stop, a pretextual stop for narcotics does not violate the Fourth Amendment's proscription against unreasonable searches and seizures. ***Whren***, 116 S. Ct. at 1774. As we noted in ***Gaulrapp***, the "subjective intentions of the officers do not make the continued detention illegal as long as the officers have a probable cause or reasonable suspicion to detain in the first instance." ***Gaulrapp***, 207 Wis.2d at 607, 558 N.W.2d at 700. Under ***Griffin*** and ***Whren***, the stop was reasonable.

In addition to finding the stop lawful, we also hold that the scope of the detention was lawful. At the suppression hearing, the trial court found Deputy Richards's testimony more credible than Kehler's. Because there is credible evidence in the record to support that finding, we accept the trial court's findings that Kehler did not offer his proof of title and registration and that only two minutes elapsed between the time Kehler was stopped and the time he granted consent to search the car. Based on these facts, we conclude that the limited detention to determine if the vehicle was lawfully registered was reasonable under the Fourth Amendment.

B. Consent To Search

Kehler next argues that the State did not prove by clear and convincing evidence that his consent to search his vehicle was freely and voluntarily given. He argues that under the totality of the circumstances, his consent was involuntary, due in large part to the "coercive nature of the custodial detention and inquisition."

At the suppression hearing, Kehler testified that he continually, "perhaps five times," refused to consent to the search. He denied that he ever consented to the search of his car, and testified that after he refused to consent, Deputy Richards became

[10] Section 341.04, STATS., prohibits operation of an unregistered motor vehicle.

"puzzled or irritated," asking him in a "taunting" manner, "How come you won't let us search your car? What are you trying to hide?" In contrast, Deputy Richards testified that Kehler consented to the search after only one request. After concluding that Deputy Richards's testimony was more credible than Kehler's, the trial court found that consent was "freely given."

On appeal, Kehler raises a coercion argument. At the suppression hearing, however, he denied ever giving consent. We agree with the State that, under ***State v. Ledger***, 175 Wis.2d 116, 499 N.W.2d 198 (Ct. App. 1993), Kehler's repeated denial at the suppression hearing that he consented forecloses the argument on appeal that he indeed gave consent but that it was coerced. ***Id.*** at 135, 499 N.W.2d at 206. As the ***Ledger*** court explained: "[F]or purposes of trial court proceedings, ... a party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling." ***Id.*** Kehler never presented the coercion argument to the trial court. This court will not consider issues raised for the first time on appeal. *See* ***State v. Lipke***, 186 Wis.2d 358, 369 n.3, 521 N.W.2d 444, 448 n.3 (Ct. App. 1994). Accordingly, we decline to review Kehler's coercion argument.

C. Cross-Examination Of Deputy Fischer

Kehler argues that the trial court erred by not allowing him to question Detective Fischer regarding consent, pointing out that this testimony would have been "very useful to the trier of fact ... in appraising Detective Fischer's credibility that ... [Kehler] possessed narcotics with intent to deliver" because, given that Fischer and Kehler were the only two witnesses at trial, and because their testimony directly conflicted, credibility was a "key factor." We review the trial court's decision to admit or exclude evidence for misuse of the court's discretion. ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 105, 522 N.W.2d 542, 546 (Ct. App. 1994). However, we

will not overturn a discretionary decision on a ground not brought to the attention of the trial court. *See* ***State v. Foley***, 153 Wis.2d 748, 754, 451 N.W.2d 796, 798 (Ct. App. 1989). The trial court can exercise its discretion in limiting the scope of cross-examination, ***State v. Echols***, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638, *cert. denied*, 510 U.S. 889 (1993), but its discretion is subject to the prohibition against prejudicial, erroneous or irrelevant matter. ***Desjarlais v. State***, 73 Wis.2d 480, 502, 243 N.W.2d 453, 464 (1976).

Kehler misstates the record when he asserts that the trial court did not allow him to "cross-examine Detective Fischer regarding the issue of consent." The record establishes that the trial court limited Kehler's cross-examination of Detective Fischer regarding consent because it had already decided the consent issue at the suppression hearing. The trial court explained:

> As a general proposition, I don't think that's relevant. That's a legal issue that I've already ruled on.... The jury is not going to be given the question and cannot decide whether ... it was proper for the officer to stop the car.... The basis for the stop, the basis for the search are legal questions that the jury is not being called upon to answer, so I don't think that it's particularly relevant to go into except to the extent that it somehow impacts on the officer's credibility versus the defendant's credibility on some issue in the case."

The trial court did, however, allow Kehler to ask Deputy Fischer if he heard Deputy Richards ask Kehler for consent to search the car. Detective Fischer replied that he never heard Kehler "say 'no' at any time." On cross-examination, Detective Fischer also testified regarding the number of times Deputy Richards asked Kehler for consent. Moreover, the trial court allowed Deputy Richards to testify on direct examination that Kehler gave his consent freely and voluntarily. Further, in its instructions to the jury, the trial court warned the jury against considering the "legality of the stop and search of the

defendant's vehicle regarding admissibility of the evidence," but added that the jury could "consider the testimony regarding issues of credibility."

Further, as the State notes, Kehler did not make an adequate offer of proof to the trial court regarding the "materiality and necessity of the evidence he wished to elicit." ***Echols***, 175 Wis.2d at 679, 499 N.W.2d at 639. Kehler offered the following basis for cross-examination of Detective Fischer: "But I guess my inquiry or concern is that it seems to me I have a right for the general basis of credibility the jury has to weigh to also bring in the sequence of events, or I have the right to do—bring in the sequence of events dealing with the stop, the search, and the seizure." The trial court rejected this basis noting that the stop and search was not a jury question, but a question of law the court had already decided, and that it was therefore irrelevant. At that point, Kehler offered no other reason why further cross-examination of Detective Fischer regarding the issue of consent was necessary and relevant to the issue at trial—whether Kehler possessed cocaine with intent to deliver. He never told the trial court what he argues in his brief—that cross-examination of Detective Fischer regarding consent would have been "very useful to the trier of fact ... in appraising Detective Fischer's credibility that ... [Kehler] possessed narcotics with intent to deliver." Based on the defendant's offer of proof, we conclude that the trial court properly exercised its discretion in limiting the cross-examination of Detective Fischer.

D. Tax Stamp Conviction

In ***State v. Hall***, 207 Wis.2d 54, 557 N.W.2d 778 (1997), the supreme court held that the drug tax stamp law is unconstitutional. Accordingly, we reverse and remand for the trial court to vacate the drug tax stamp law conviction.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.