COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP1127-CR
2008AP1138-CR

Cir. Ct. Nos. 2006CF2606
2005CF5739

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DE-YUL THAMES,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JOSEPH R. WALL and KEVIN E. MARTENS, Judges.[1] *Affirmed.*

[1] The Honorable Joseph R. Wall presided at the trial and entered the judgment of conviction. The Honorable Kevin E. Martens heard the postconviction motions and entered the orders denying postconviction relief.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. De-Yul Thames appeals from judgments entered in two separate cases, wherein he was convicted of possession of cocaine, possession of marijuana and bail jumping, contrary to WIS. STAT. §§ 961.41(3g)(c), 961.41(3g)(e) and 946.49(1)(b) (2005-06).[2] He also appeals from orders entered in the two cases denying his postconviction motions. We consolidated the two cases for purposes of appeal and disposition.

¶2 Thames raises three claims on appeal: (1) the trial court erroneously exercised its discretion at sentencing when it considered the charges he was acquitted of; (2) his due process rights were violated when the State sold his vehicle prior to trial; and (3) the trial court should have granted his motion seeking to suppress evidence in the second case on the ground that the police did not have reasonable suspicion to stop him. We reject each contention and affirm.

BACKGROUND

¶3 As noted, this appeal involves two separate cases, which were consolidated for purposes of appeal. The first case, Circuit Court Case No. 2005CF5739 stemmed from an incident in October 2005. The second case, Circuit Court Case No. 2006CF2606 arose from conduct that occurred in May 2006 while Thames was out on bail pending trial in the first case. The facts pertinent to each case are set forth below.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

A. Case No. 2005CF5739.

¶4 On October 5, 2005 at about midnight, two City of Milwaukee Police Officers observed a blue four-door Cadillac driving on West Greenfield Avenue without its headlights on. The police turned on the lights and siren of their marked squad car to initiate a stop of the Cadillac. The Cadillac, however, did not stop. Instead, it proceeded through the city streets to the freeway on-ramp. The squad car followed the Cadillac onto the freeway. The chase continued at approximately 50 m.p.h., during which the police observed the Cadillac driver throw out of his window, two small baggies and one large bag containing a white powdery substance. The large bag struck the hood of the squad car. Shortly after tossing the third bag out the window, the Cadillac exited the freeway and pulled over for the police.

¶5 The driver, identified as Thames, was uncooperative and had to be forcibly removed from the vehicle. The police then observed a white chunky substance of suspected crack cocaine base on the front driver's seat. They also found 139 small brown vials consistent with what is typically used to package and deliver cocaine as well as five cell phones.

¶6 With the assistance of the Milwaukee County Sheriff's Office, the route of the chase was retraced in an attempt to recover the bags, which had been tossed out the window of the Cadillac. The police were unable to recover the small baggies, but did locate the larger one. The police were able to recover much of the suspected cocaine from the roadway. The suspected cocaine from the roadway and the front seat of the Cadillac were sent to the crime lab for testing. Both were confirmed to be cocaine and weighed 12.41 grams.

¶7 Thames was charged with fleeing an officer and possession with intent to deliver a controlled substance, cocaine (more than five but less than fifteen grams). This case was tried to a jury in June 2007 after which Thames was found not guilty on the fleeing charge and not guilty on the possession with intent to deliver charge. The jury did find Thames guilty of the lesser-included offense of possession of a controlled substance.

B. Case No. 2006CF2606.

¶8 On May 15, 2006, Milwaukee police received a telephone call that a person, who was suicidal, was missing and thought to be driving a blue four-door automobile. The person was described as a forty-seven-year-old white male. Milwaukee Police Officer Paul Hinkley observed a vehicle matching the description given. Hinkley could not get a visual look at the driver, but activated his squad car's lights and siren in an attempt to stop the vehicle. The blue four-door vehicle did not stop for the squad car. Instead, it continued driving on city streets until it reached the freeway on-ramp. After getting on the freeway, the vehicle accelerated to speeds in excess of 65 m.p.h. with the squad car in pursuit. While on the freeway, the police observed the driver of the vehicle throwing clear plastic bags out the window. The vehicle eventually stopped. The driver was identified as Thames. He was arrested and the vehicle was searched. Two small bags of suspected marijuana were found under the driver's seat. The bags were sent to the crime lab for testing and confirmed to be marijuana with a weight of 4.1 grams.

¶9 Thames was charged with fleeing, possession of a controlled substance (marijuana) and felony bail jumping. Thames filed a motion seeking to suppress evidence seized by police on the ground that the police did not have

probable cause to conduct the initial stop of his vehicle. The trial court denied the motion. The case was tried to a jury in June 2007 after which Thames was found not guilty of fleeing, but guilty of possession of marijuana as well as felony bail jumping.

C. Consolidated Sentencing on the Two Cases.

¶10 The two cases were consolidated for purposes of sentencing, which was held on July 18, 2007. The trial court sentenced Thames to one year in prison and a $200 fine on the possession of cocaine conviction in the 2005 case. In the 2006 case, the trial court sentenced Thames to six years on the bail jumping charge, consisting of three years' initial confinement followed by three years' extended supervision and a $100 fine. On the possession of marijuana charge, Thames was sentenced to six months in jail and a $100 fine.

¶11 Thames filed postconviction motions in both cases, which were denied. He now appeals.

DISCUSSION

A. Sentencing.

¶12 Thames claims the trial court erroneously exercised its discretion at the sentencing hearing by considering the charges on which he was acquitted. The State responds that the trial court did not inappropriately consider the acquitted charges at sentencing, but rather was considering those charges as a part of its obligation "to assess the defendant's character using all available information." *See* ***State v. Arredondo***, 2004 WI App 7, ¶53, 269 Wis. 2d 369, 674 N.W.2d 647. We agree with the State.

¶13 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). There is a strong policy against an appellate court interfering with a trial court's sentencing determination, and an appellate court must presume that the trial court acted reasonably. *See* ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988).

¶14 The sentencing court must consider three primary factors: (1) the gravity of the offense, (2) the character of the offender and (3) the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989).

¶15 Here, Thames complains that by considering the fleeing charges and the possession of cocaine with intent to deliver charge, which the jury acquitted him of, the trial court replaced the jury's verdict with its own. He argues that such constitutes an erroneous exercise of sentencing discretion. We are not persuaded.

¶16 The law in this state clearly permits the sentencing court to consider "uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted." ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 (footnote omitted). Considering this information allows sentencing courts "to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" ***Id.*** (citation omitted). Just because a defendant is acquitted of some charges does not mean he is innocent of them. It merely proves the existence of reasonable doubt. ***United States v. Watts***, 519 U.S. 148, 155 (1997). So the question is whether the facts surrounding the acquitted charges are sufficiently reliable to justify the trial court's reliance on them and whether they are relevant to the defendant's character.

¶17 Here, the trial court carefully considered the acquitted facts in a very detailed and thoughtful sentencing analysis. The court commented that it had heard the testimony in both jury trials and therefore had a unique opportunity to weigh the strength of the acquitted facts. The court noted that it chose to follow the higher federal case threshold, that of preponderance of the evidence, when weighing the admissibility and relevance of the acquitted facts. Using this analysis, the trial court determined that the acquitted facts were reliable and relevant to the issues of the defendant's character and to his pattern of behavior.

¶18 The trial court found Thames's pattern of behavior in these two cases of fleeing police, driving to a nearby freeway and throwing baggies of drugs out the windows of his car as he fled, was designed by Thames to escape serious criminal charges. The court commented that it found Thames to be very smart, charismatic, anti-social and dangerous. This consideration did not punish him for crimes for which he was acquitted, but it presented the total picture of Thames's

character which the trial court properly considered at sentencing. *See* ***Arredondo***, 269 Wis. 2d 369, ¶53. Thus, the trial court did not erroneously exercise its sentencing discretion by referring to and considering the information relative to the acquitted charges.

B. Sale of Thames's Vehicle.

¶19 Thames next claims the State violated his due process rights by selling his vehicle. He argues that the vehicle constituted exculpatory evidence because the windows in the vehicle were inoperable and thus would refute the police testimony that he threw drugs from the window. He also asserts that he wanted to have the car's front seat tested for cocaine residue. The State responds that Thames failed to satisfy the pertinent legal standards requiring the State to preserve exculpatory evidence and that Thames was not prejudiced by the State's failure to preserve the vehicle as he presented comparable evidence to show the windows did not work through the testimony of a car mechanic who had recently examined the car. We agree with the State.

¶20 Thames can establish a due process violation based on an allegation that the State failed to preserve exculpatory evidence, in one of two ways. First, he may show that his vehicle was exculpatory, material evidence, that the State knew it was exculpatory *and* that he cannot present that exculpatory evidence through reasonably available comparable evidence. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). Second, he may show that the vehicle was "potentially useful" to presenting his defense and the State sold it in "bad faith." ***Id.*** (quoting ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988)).

¶21 Whether a due process violation has occurred here presents a question of constitutional fact, which we review *de novo*. *See* ***Greenwold***, 181 Wis. 2d at 66. Thames does not allege that the State acted in bad faith in selling his vehicle. Thus, we address only whether he has satisfied the first test enunciated above.

¶22 Thames contends the vehicle was material exculpatory evidence because it would have supported his contention that he did not throw drugs from the window while driving as the windows were not functioning. We reject his contention for two reasons. First, he presented "reasonably comparable evidence" to the jury. That is, a mechanic who testified on behalf of the defense told the jury that when he examined the car two weeks prior to the incident in this case, the vehicle's windows were not functioning. Although two weeks before the incident may not be as compelling as at arrest and impounding of the vehicle, it is reasonably comparable. Based on this, Thames could not satisfy the standard to establish a due process violation occurred.

¶23 Second, it is arguable as to whether having the vehicle to show to the jury would have even been exculpatory. One of the arresting police officers testified at trial that the driver's window was open a half-inch when they stopped Thames and a videotape taken of the vehicle while at an impound lot revealed the same thing. Thus, the exculpatory value of the vehicle is highly speculative and insufficient to show a due process violation occurred. *See* ***State v. Tarwid***, 147 Wis. 2d 95, 105, 433 N.W.2d 255 (Ct. App. 1988).

¶24 We conclude that Thames failed to establish any due process violation related to the State's sale of the vehicle.[3]

C. Suppression Motion.

¶25 Thames's final claim is that the trial court should have suppressed the evidence obtained in the 2006 case on the ground that they lacked reasonable suspicion to conduct the initial stop. The State responds that the stop was constitutionally permissible pursuant to the community caretaker exception. We agree.

¶26 Both the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee to all citizens the right to be free from unreasonable searches and seizures. Because an investigatory stop is a "seizure" within the meaning of the Constitution, a law enforcement officer, before stopping an individual, must reasonably suspect, in light of his or her training and experience, that the individual is, or has been, involved in criminal activity. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968); ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993); WIS. STAT. § 968.24.

¶27 For a stop to be constitutionally valid, the police officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion" on a citizen's liberty. ***Terry***, 392 U.S. at 21. It is a common-sense test; what is

[3] Thames's claim that he wanted the car in order to do his own testing of the front seat is not adequately developed and entirely conclusory. Accordingly, we need not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to review an issue that is inadequately briefed).

reasonable in a given situation depends upon the totality of the circumstances. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶28 A police officer does not need reasonable suspicion to conduct a stop if he or she is operating pursuant to the community caretaker exception. Under this doctrine, a court must first inquire whether, at the time of the conduct in question, the police officer was engaged in a bona fide community caretaker activity, which is defined as an action that is "totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." ***State v. Ellenbecker***, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990). The second inquiry involves assessing whether "'public need and interest outweigh the intrusion upon the privacy of the individual.'" ***State v. Kramer***, 2008 WI App 62, ¶10, ___ Wis. 2d ___, 750 N.W.2d 941 (citation omitted), *petition for review granted*, 2008 WI 115, ___ Wis. 2d ___, 754 N.W.2d 849 (June 11, 2008).

¶29 In reviewing the denial of a motion to suppress, we will uphold the trial court's findings of historical fact unless they are clearly erroneous. ***State v. Sykes***, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277. However, whether a stop passes constitutional muster is a question of law which we review independently. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶30 Thames does not argue that the community caretaker exception should not apply given the circumstances presented to the police officers. Clearly, a report of a person who is suicidal driving a vehicle triggers the responsibility of the police to exercise their community caretaking function. As noted by the trial court:

> They were attempting to stop what they believed was a suicidal person and to obviously prevent a suicide of the person and also I'm sure in their minds, and this is common sense so I don't need to have a factual record concerning … a person who is suicidal in a car.
>
> What follows from that is that person may not care who he takes with him or she takes with [her]. The car being potentially the avenue for suicide and may be potential for obviously turning in front of traffic, cause a head-on collision, killing a couple people not just the suicidal person or going off an overpass and maybe landing on somebody. Those type of things have to always be in our mind when we look at suicide by car.
>
> ….
>
> Well, first of all you prevent a person, potentially prevent a person from killing themselves. That serves the public good.
>
> Second of all, you may prevent a person from killing themselves and maybe taking others with them through the use of a vehicle.

¶31 Here, Thames contends that the community caretaker exception should not apply because the "suicidal" person was white and older, whereas he was black and younger. The record reflects that the police heard the dispatch and observed a car that matched the description of that being driven by the suicidal person. The trial court found, based on the police testimony, that they could not see whether the person driving was white or black. This finding is not clearly erroneous, and accordingly, Thames's argument on this basis is without merit.

¶32 Once the police pulled behind Thames and turned on their vehicle's lights and siren, he failed to pull over. Then the police saw him throwing bags out the window. These additional facts created reasonable suspicion to conduct a ***Terry*** stop. *See* ***State v. Young***, 2006 WI 98, ¶¶70-71, 294 Wis. 2d 1, 717 N.W.2d 729 (even if the officer did not have reasonable suspicion when he made the show of authority, the officer had reasonable suspicion after suspect disregarded the

officer's order). We conclude that the police officers' initial pursuit of Thames was justified under the community caretaker exception. Moreover, Thames's failure to pull over for the police, his tossing of bags from his vehicle and his flight overwhelmingly demonstrates reasonable suspicion in this case. Based on our review, we conclude that the police officers' initial stop of Thames in the 2006 case was constitutionally permissible. Therefore, the trial court did not err in denying Thames's motion seeking to suppress evidence on that basis.

¶33 Based on the foregoing, we reject each of Thames's claims of error and affirm.

By the Court.—Judgments and orders affirmed.

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