COURT OF APPEALS DECISION DATED AND FILED

July 28, 2009

David R. Schanker
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. 2008AP1463-CR

Cir. Ct. No. 2005CF551

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERNEST M. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ernest Moore appeals a judgment of conviction for various drug possession charges and an order denying his postconviction motion. Moore argues he was entitled to the suppression of all evidence obtained from his traffic stop because the stop was illegal. He also argues the circuit court erred by

permitting the State to introduce testimony about how the arresting officer believed the drugs were hidden. We affirm the judgment and order.

BACKGROUND

¶2 Trooper Lawrence Brown was monitoring traffic in the median of Interstate 94 when he was notified by dispatch that a caller had complained about a car driving erratically on the highway. The caller reported the car was "all over the road" and that it almost sideswiped another car. The caller then described both the car and the driver, including that the driver was African-American. Soon after, Brown saw a car matching the description the caller had given, and pulled onto the highway to follow it. When Brown caught up to the car, it exited the highway. Brown followed and noticed the car's center deck brake light was not working. The car crossed the crossroad and reentered the highway. Brown then initiated a traffic stop. After questioning Moore, Brown returned to his squad car to run Moore's driver's license. Because he thought Moore was being deceptive,[1] he also requested a criminal history check and radioed for a K-9 unit.

¶3 The K-9 unit arrived while Brown was generating a warning citation for Moore's defective brake light. While Brown explained the warning to Moore, the K-9 officer conducted a dog sniff of the car's exterior. After the dog alerted in front of the driver's door, Brown searched the car and found plastic bags under the hood containing 63.5 grams of cocaine and 151.5 grams of heroin.

[1] Brown cited Moore's inability to produce the car's registration as well as Moore's contradictory claims that he was from Illinois and headed home—he was traveling westbound toward Minnesota. He also noted that both Moore and his passenger appeared to be very nervous, Moore refused to make eye contact with him and was reluctant to provide Brown his social security number.

¶4 Moore moved to suppress all evidence obtained from the stop, arguing he was stopped because he is African-American and not because Brown reasonably suspected he was committing a crime or violating traffic laws. The circuit court denied the motion, concluding Moore presented no evidence he was stopped for anything other than constitutionally permissible reasons. Following a jury trial, Moore was convicted of two counts of possession with intent to deliver controlled substances and two counts of dealer possession of controlled substances without a tax stamp, all as party to the crime and all as a repeater.

¶5 Moore filed a postconviction motion, arguing he was entitled to a new trial because Brown had been permitted to testify he told the K-9 officer—based on where the dog alerted—that he expected the drugs were hidden as a "suicide load." Brown explained that this "is a load where somebody's made so many trips that they don't even bother to try to hide it anymore. They just throw it in a plastic bag under the hood." Moore argued this was improper expert testimony and inadmissible evidence of Moore's other bad acts. He further argued his trial counsel was ineffective for failing to object to it as such.[2]

¶6 The circuit court denied his motion, concluding Brown's testimony was neither expert testimony nor evidence of Moore's other bad acts. It also concluded that even if it were evidence of other bad acts, Moore failed to show he was prejudiced by the testimony.

[2] Moore's trial counsel objected to the relevance of Brown's testimony that he expected the drugs were hidden as a suicide load.

DISCUSSION

¶7 Moore raises three arguments on appeal. The first two pertain to the lawfulness of the initial stop. First, Moore argues Brown did not have reasonable suspicion to initiate the traffic stop. He then contends the stop violated his equal protection rights because the real reason Brown stopped him was his race. Moore's third argument challenges the denial of his postconviction motion. He contends the circuit court improperly admitted Brown's testimony that the drugs appeared to be hidden as a suicide load.

1. Reasonable suspicion

¶8 An officer may make an investigatory traffic stop if the officer "reasonably suspects that a person is violating the non-criminal traffic laws." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). Whether a traffic stop is reasonable is a question of constitutional fact, which presents a mixed standard of review. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We uphold a circuit court's findings of fact unless clearly erroneous, but review independently the application of these facts to the constitutional standard. ***Id.***

¶9 Moore argues Brown did not have reasonable suspicion to initiate a traffic stop because it is not unlawful to operate a car with a defective center deck brake light as long as the other two brake lights are working. This assertion is directly contrary to the Wisconsin Administrative Code. WISCONSIN ADMIN. CODE § TRANS 305.15(5)(a) (May 2004), provides: "The high-mounted stop lamp of every motor vehicle originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition and may not be covered or obscured by any object or material."

¶10 Brown stopped Moore after observing he was operating a vehicle with a defective brake light in violation of WIS. ADMIN. CODE § TRANS 305.15(5)(a). Administrative rules have "the force and effect of law." ***Wisconsin Citizens Concerned for Cranes & Doves v. DNR***, 2004 WI 40, ¶5, n.5, 270 Wis. 2d 318, 677 N.W.2d 612. Therefore, Moore's defective brake light provided an adequate basis for Brown to believe Moore was violating non-criminal traffic laws. *See* ***Renz***, 231 Wis. 2d at 310.

¶11 Moore argues, for the first time on appeal, that WIS. ADMIN. CODE § TRANS 305.15(5)(a) is an unlawful expansion of the department of transportation's rulemaking authority. We have repeatedly stated that we will not consider arguments raised for the first time on appeal. ***Tomah-Mauston Broad. Co. v. Eklund***, 143 Wis. 2d 648, 657-58, 422 N.W.2d 169 (Ct. App. 1988). We therefore consider this argument forfeited. *See* ***id.***

2. Selective enforcement

¶12 A defendant claiming an equal protection violation on the basis of selective enforcement must make a prima facie showing that the enforcement had a discriminatory effect and a discriminatory purpose. ***State v. Kramer***, 2001 WI 132, ¶¶15-18, 248 Wis. 2d 1009, 637 N.W.2d 35. If the defendant succeeds, the burden shifts to the State to show the enforcement was a valid exercise of discretion. ***Id.***, ¶15. We review a circuit court's decision on whether a defendant has established a prima facie case for the erroneous exercise of discretion. ***Id.***, ¶17. "[W]e will uphold the decision of the circuit court if it is supported by credible evidence or reasonable inferences that can be drawn from this evidence." ***Id.*** (citation omitted).

¶13 The circuit court concluded that because Moore presented no evidence to support his allegations of selective enforcement, he failed to make the requisite prima facie showing of discriminatory effect and discriminatory motivation. We conclude this was not an erroneous exercise of the court's discretion.

¶14 Moore's suppression motion contains only unsubstantiated allegations he was targeted for his race. For example, he contends that "he is a victim of the Wisconsin State Patrol and/or Trooper Brown's unlawful practice of stopping, detaining and searching African-American and Hispanic motorists, subjecting them to investigatory stops based … solely upon race and without legally sufficient cause or justification." But he provides no evidence supporting this allegation. Instead, he makes the conclusory statement, "Without repeating the facts of the present case, given the circumstances of the present stop and search, it is clear that the race of Mr. Moore played a part in Trooper Brown's decisions and actions, most importantly his decision to call for a drug dog one minute after the initial stop."[3]

¶15 Unsubstantiated allegations of selective enforcement are not sufficient to show a traffic stop had a discriminatory effect and a discriminatory purpose. To present a prima facie case, a defendant must present "evidence which, if credited, is sufficient to establish a fact or facts which it is adduced to prove." ***Kramer***, 248 Wis. 2d 1009, ¶16 (citation omitted). That is, the evidence

[3] On appeal, Moore devotes a considerable amount of his argument to Brown's decision to call a K-9 unit shortly after stopping him. Moore contends this indicates Brown's purpose for stopping him all along had little if anything to do with his defective brake light. This argument is misplaced. Brown's request for a K-9 unit is irrelevant absent evidence his motivation for calling the unit was racially motivated. Moore provides none.

presented must be "sufficient to raise an issue to go to the trier of fact." ***Id.*** Moore simply did not do this.

¶16 The record indicates Brown followed Moore because the highway patrol received a call that Moore's car was "all over the road" and nearly sideswiped another vehicle. Brown then stopped Moore after observing his car had a defective brake light. Moore offered no evidence the stop occurred for a purpose other than these constitutionally permissible reasons. Therefore, the court correctly concluded he failed to present a prima facie case of selective enforcement.

3. Suicide load testimony

¶17 Moore argues the circuit court erred by admitting Brown's testimony that he believed the drugs were packaged as a suicide load. First, he contends the testimony was unqualified expert testimony that the drugs "were put in the car … by a seasoned drug runner." Second, he argues the testimony is impermissible evidence of Moore's other bad acts because it implied Moore had transported drugs many times before.

¶18 We review a circuit court's evidentiary rulings for the erroneous exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We agree with the circuit court that Brown's testimony was neither expert testimony nor evidence of Moore's prior bad acts. It was simply Brown's opinion about where he thought the drugs would be located. Therefore, we conclude the court's admission of this testimony was not an erroneous exercise of its discretion.

¶19 Moore originally challenged Brown's suicide load testimony within the context of an ineffective assistance of counsel claim. We do not address this

claim because he abandoned it on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised in the trial court but not raised on appeal are deemed abandoned). We note, however, that even if Moore had not abandoned this argument, the result would be the same. Moore's ineffective assistance argument depended on the assertion the testimony was either expert testimony or other bad acts evidence. It was neither.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).