COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP1933-CR
2009AP1934

Cir. Ct. Nos. 2008CM3538
2008TR16663

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KYLE J. GRASKE,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] The State appeals from orders suppressing evidence against Kyle J. Graske for possession of Tetrahydrocannabinols (THC)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 unless otherwise noted.

and drug paraphernalia and dismissing a charge of operating with a detectable amount of a restricted controlled substance (first offense). The trial court dismissed the State's charges after suppressing evidence obtained during a traffic stop. The State alleges that Graske's passenger, Justin Kohel, provided the deputy with probable cause to search the car by making the "voluntary" statement "we just smoked an hour ago" to the deputy. But the statement cannot be "voluntary" or admissible because the passenger made the statement during a custodial interrogation without the benefit of ***Miranda***[2] rights. The State is left with only the smell of marijuana coming from the vehicle and asserts that the smell alone is probable cause to search the vehicle and arrest Graske for operating under the influence of a controlled substance. However, for the smell to provide probable cause for an operating with a controlled substances arrest, the smell must be specifically linked to Graske. Without the passenger's statement, the State had nothing linking Graske to the smell to provide probable cause to arrest. Regarding the possession of THC charge, we agree that the smell of marijuana provided probable cause to search the vehicle and backpack. The search yielded a backpack which had contraband in it. But the trial court concluded, after considering relevant testimony, that dominion and control of the backpack belonged to the passenger, not Graske. Such a finding is neither clearly erroneous nor constitutionally infirm. We affirm in total.

BACKGROUND

¶2 On December 4, 2008, during routine patrol, a Racine county sheriff's deputy ran a license plate check on the car driven by Graske. The check

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

revealed that the owner had a warrant and suspended driver's license. The deputy proceeded to pull the vehicle over to arrest the owner on the warrant. The deputy noticed that there were two occupants in the car fitting the description of the owner. As the deputy approached the car to determine whether one of the occupants was the owner wanted on the warrant, he smelled burnt marijuana coming from inside.

¶3 The deputy talked to the occupants and determined that the passenger, Justin Kohel, was actually the owner of the car. The deputy placed Kohel under arrest for the warrant and secured him in the squad car. After Kohel's arrest and before giving him his ***Miranda*** warning, the deputy proceeded to question him about the marijuana smell. Kohel answered the deputy by stating something to the effect of, "We just smoked an hour ago." After Kohel's admission, the deputy proceeded to search the car.

¶4 During the search of the car, the deputy discovered marijuana and marijuana paraphernalia in a backpack located on the floor of the front passenger's seat. The deputy looked through the backpack and found Graske's checkbook along with an envelope of Kohel's photos in the backpack. The deputy considered Graske's checkbook in the backpack an indicia of ownership and arrested Graske for possession of THC, possession of drug paraphernalia, and operating a motor vehicle with a detectable amount of a controlled substance (first offense).

¶5 The trial court determined that the deputy's only basis for arresting Graske was Kohel's statement and the odor of burnt marijuana. The trial court found that Kohel's statement was made after he was placed under arrest, handcuffed, and questioned by the deputy. Also, the court found that the odor of burnt marijuana was not sufficiently connected to Graske to establish probable

cause for an arrest. The deputy smelled tobacco on Graske's breath and did not have any basis to link Graske to the odor coming from the car other than the passenger's suppressed statement. Finally, the trial court considered whether Graske was in possession of the backpack. The court stated that Graske's checkbook in the backpack was not an indicia of ownership or possession and that the other testimony clearly established that the backpack was in the passenger's possession.

DISCUSSION

¶6 The State appeals the trial court's findings that the deputy did not have probable cause to arrest Graske for (1) operating with a controlled substance in his system or (2) possession of marijuana and marijuana paraphernalia. Factual findings of a trial court are upheld unless those findings are clearly erroneous. ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. Whether a search is constitutional, however, is a question of law subject to independent appellate review. ***State v. Marquardt***, 2005 WI 157, ¶20, 286 Wis. 2d 204, 705 N.W.2d 878. Appellate courts review the application of constitutional principles to the trial court's findings de novo. ***State v. Grady***, 2009 WI 47, ¶13, 317 Wis. 2d 344, 766 N.W.2d 729.

1. Driving While Having a Restricted Controlled Substance in his System

¶7 First, we will address the State's argument that Kohel's statement "[w]e just smoked an hour ago" was voluntary and should not be suppressed. The trial court found, and we agree, that Kohel's statement was the result of a custodial interrogation and should be suppressed. The passenger was handcuffed, told he was under arrest for a warrant, and placed in the backseat of a squad car before the deputy point-blank asked "[W]here is the odor of burnt marijuana coming from?"

The question can only be construed to be one of gathering further evidence in support of a crime that the officer believed had occurred—and not an investigation of *whether* a crime has occurred. A statement made during a custodial interrogation, such as in this case, cannot be considered voluntary and admissible until ***Miranda*** warnings have necessarily been waived.[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 476 (1966). Kohel was not given an opportunity to waive his ***Miranda*** rights because the deputy never ***Miradized*** him. *See* ***id.*** So we agree with the trial court that the passenger's statement cannot be considered "voluntary" and is not admissible.

¶8 Next, the State argues that the deputy's testimony of smelling burnt marijuana is probable cause for an arrest. The State is correct in that, for a charge of operating a vehicle with controlled substances in his system, the odor of marijuana in a car is sufficient probable cause to arrest. ***State v. Secrist***, 224 Wis. 2d 201, 217-18, 589 N.W.2d 387 (1999). But the caveat is that the odor must be linked to a specific person. *See* ***id.*** at 212. Without the passenger's statement "we just smoked an hour ago" linking Graske to the smell, the State lacks the necessary link to establish probable cause for his arrest. The trial court found that the defendant had not been driving erratically, had tobacco on his breath, did not have blood shot eyes, or have any indicators whatsoever that he had THC in his system at the time of driving. With the incriminating statement properly suppressed, we agree with the trial court that the link between the defendant and the odor was insufficient to establish probable cause for his arrest. Therefore, we affirm the

[3] There are accepted exceptions to the waiver requirement for admissibility, such as the "public safety" exception. However, in cases such as this, when there is no pressing emergency simultaneously confronting the officer, there are not any accepted exceptions. ***New York v. Quarles***, 467 U.S. 649, 655-56 (1984).

trial court in dismissing the charge of operating with a restricted controlled substance in his system.

2. Possession of THC and Drug Paraphernalia Charges

¶9 Next, we address the possession of THC and drug paraphernalia charges. The State must establish that there was probable cause to conduct a warrantless search the car. *See* ***id.*** at 210. As we have decided above, the passenger's statement was properly suppressed. So the State is left with only the odor of marijuana that the deputy smelled upon approaching the car. While the smell of marijuana, without establishing a connection to the driver, is insufficient to arrest for operating with drugs in one's system, it nevertheless establishes probable cause to search the car for evidence of a crime. ***Id.*** Based on the deputy's testimony of the strong odor as he approached the car, the State provided sufficient evidence that there was probable cause to search the car. And the search yielded a backpack that had contraband in it.

¶10 The State asserts that Graske possessed the backpack found during the legal search because it was within his reach and contained his checkbook. But Wisconsin requires more than mere proximity to drugs to support a finding of possession. ***State v. Allbaugh***, 148 Wis. 2d 807, 812, 436 N.W.2d 898 (Ct. App. 1989). Although actual physical possession is not necessary, the State must prove that the defendant had constructive possession of the substance. ***Id.*** at 813; ***State v. Peete***, 185 Wis. 2d 4, 9, 517 N.W.2d 149 (1994).

¶11 In Wisconsin, constructive possession exists when contraband is found in a place immediately accessible to the defendant and subject to his exclusive or joint dominion and control, provided that he has knowledge of the presence of the contraband. ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d

204 (1977). The circumstances must show that the person exercised control over, or intended to possess, the items in question.[4] ***Allbaugh***, 148 Wis. 2d at 814.

¶12 The trial court found, and we agree, that there was not enough evidence connecting Graske to the backpack to support a finding of possession The trial court properly considered Graske's checkbook in the backpack as a factor to determine possession of the backpack. But the backpack was on the floorboard of the front passenger's seat in a vehicle that was not owned by Graske. And even though a person can constructively possess an object when it is in near proximity when there is no actual dominion and control, the trial court was obviously convinced that Graske did not. The court concluded that it would have been difficult for the backpack to be "immediately accessible" to Graske from where he was sitting since the backpack was sitting next to or underneath Kohel. Just the fact that Graske was in the same vehicle where the backpack was found does not by itself mean that he had dominion and control over the backpack. Whether an

[4] Courts outside of Wisconsin have articulated a number of nonexclusive factors to determine if there is a sufficient link between a defendant and contraband. These factors include but are not limited to: (1) whether the contraband was in plain view or recovered from an enclosed place; (2) whether the accused was the owner of the premises or had the right to possess the place where the contraband was found, or was the owner or driver of the automobile in which the contraband was found; (3) whether the accused was found with a large amount of cash; (4) whether the contraband was conveniently accessible to the accused or found on the same side of the vehicle as the accused was sitting; (5) whether the contraband was found in close proximity to the accused; (6) whether a strong residual odor of the contraband was present; (7) whether the accused possessed other contraband when arrested; (8) whether paraphernalia to use the contraband was in view or found on the accused; (9) whether the physical condition of the accused indicated recent consumption of the contraband in question; (10) whether conduct by the accused indicated a consciousness of guilt; (11) whether the accused attempted to escape or flee; (12) whether the accused made furtive gestures; (13) whether the accused had a special connection to the contraband; (14) whether the occupants of the premises gave conflicting statements about relevant matters; (15) whether the accused made incriminating statements connecting himself to the contraband; (16) the quantity of the contraband; and (17) whether the accused was observed in a suspicious place under suspicious circumstances. ***Willis v. State***, 192 S.W.3d 585, 593 (Tex. App. Ct. 2006).

investigatory stop meets the constitutional and statutory standards is a question of law that we review de novo. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). When we review the factors that led to determinations of constructive possession in other Wisconsin cases, the universality of which is neatly compartmentalized in the Texas case cited in the footnote, ***Willis v. State***, 192 S.W.3d 585, 593 (Tex. App. Ct. 2006), most of the factors that would be indicia of ownership are simply not present in our case. Under the specific facts of this case, there just was not enough.

By the Court.—Orders affirmed.

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