COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2909-CR **Cir. Ct. No. 2007CF321**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY A. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Corey Smith appeals a judgment convicting him of possessing cocaine with intent to deliver as a repeater. He pled no contest after the circuit court denied his motion to suppress cocaine seized from his vehicle. Smith argues the police lacked probable cause to search the vehicle. Because the police

had probable cause to search under the automobile exception and probable cause to arrest Smith and search the vehicle incident to the arrest, we affirm the judgment.

¶2 Deputy Dan Baucknecht was the only witness at the suppression hearing. He testified he witnessed a confidential informant's telephone conversation in which the informant arranged to purchase $1,800 worth of cocaine. The transaction was to take place in the rear parking lot of a tavern. The informant told the seller he would be in a black Mercedes. The informant told Baucknecht the seller was a light-colored, African American with dreadlocks or corn-rowed hair.

¶3 The seller called several more times during his trip from Milwaukee, keeping the informant apprised of his estimated time of arrival. The last call indicated the seller was approximately thirty minutes from the tavern. Twenty-five to thirty-five minutes after the last phone call, Baucknecht observed Smith, who fit the seller's description, drive into the rear parking lot. Smith parked right next to the informant's Mercedes, the only other car in the lot. An individual who appeared to know the informant jumped out of the car. Officers immediately moved in and took the vehicle's three occupants into custody. After a brief search, officers discovered a baggie containing cocaine under the gas tank flap.

¶4 Police can constitutionally search a vehicle without a warrant under the automobile exception if the car is readily mobile and probable cause exists to believe it contains contraband. ***Maryland v. Dyson***, 527 U.S. 465, 467 (1999). A vehicle is readily mobile even if the driver and occupants have been arrested because, although their arrest makes the vehicle less accessible to those individuals, it would not prevent other unknown individuals from moving the

vehicle. ***State v. Marquardt***, 2001 WI App 219, ¶42, 247 Wis. 2d 765, 635 N.W.2d 188. A search incident to arrest is constitutionally valid when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. ***Arizona v. Gant***, 129 S. Ct. 1710, 1719 (2009). In such a case, the search is valid even if the search compartment is not within the defendant's immediate control. ***Id.*** Whether probable cause exists depends on the totality of the circumstances, and is a flexible, commonsense standard. ***State v. Tompkins***, 144 Wis. 2d 116, 123-25, 423 N.W.2d 823 (1988). The question is whether it is reasonable to believe contraband would be located in the vehicle. ***Id.***

¶5 The officers had probable cause to search the vehicle. The initial telephone conversation setting up the drug deal, Smith's arrival at the tavern parking lot within five minutes of the expected rendezvous time, Smith's physical resemblance to the seller's description and his parking next to the only other car in the lot at or near tavern closing time constitutes sufficient probable cause to search the vehicle under the vehicle exception. The same facts also provide sufficient probable cause to arrest the occupants of the vehicle and perform a drug search incident to the valid arrests.

¶6 Smith argues probable cause was negated because a dog on the scene did not locate drugs in the car. Although the testimony briefly referred to the presence of a dog on the scene, there was no testimony it was a trained drug dog. In addition, a survey of case law reported in ***Commonwealth v. Brown***, 924 A.2d 1283, 1287-90 (Pa. Super. Ct. 2007), discloses a nearly universal rule that a drug sniffing dog's failure to alert does not necessarily destroy probable cause that would otherwise exist. The dog's failure to alert does not negate the commonsense probability that the vehicle contained cocaine and its occupants were there to complete the drug transaction.

By the Court.—Judgment affirmed.

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