COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP694-CR **Cir. Ct. No. 2008CF5156**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEAVIN L. COTTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Keavin L. Cotton has appealed from a judgment convicting him upon a guilty plea of one count of possession of marijuana with

intent to deliver as a second or subsequent offense in violation of WIS. STAT. §§ 961.41(1m)(h)1 and 961.48 (2009-10).[1] The sole issue on appeal is whether the trial court erred in denying Cotton's motion to suppress evidence seized from a black bag in a vehicle he had been driving just prior to his arrest. We conclude that the trial court properly denied the motion to suppress and affirm the judgment of conviction.

¶2 As the party who filed the motion to suppress, Cotton had the burden of establishing that his constitutional rights were violated by the search. ***State v. Bruski***, 2007 WI 25, ¶20, 299 Wis. 2d 177, 727 N.W.2d 503. He bore the burden of proving that he had standing to bring the motion, which required him to prove that he had a reasonable expectation of privacy in the area searched and the item seized. ***Id.***, ¶22; ***State v. Neitzel***, 2008 WI App 143, ¶12, 314 Wis. 2d 209, 758 N.W.2d 159. In reviewing a trial court's determination as to whether a defendant had a reasonable expectation of privacy in the area searched, we accept its factual findings unless they are clearly erroneous. ***Bruski***, 299 Wis. 2d 177, ¶19. The ultimate question of whether the defendant had a reasonable expectation of privacy in the area searched is a question of constitutional law that we review de novo. ***Id.***

¶3 Whether a person has a reasonable expectation of privacy depends on: (1) whether the person has exhibited an actual, subjective expectation of privacy in the area inspected and the item seized, and (2) whether society is willing to recognize such an expectation of privacy as reasonable. ***Neitzel***, 314 Wis. 2d 209, ¶12. In determining whether society is willing to recognize an

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

expectation of privacy as reasonable, courts may consider: (1) whether the person had a property interest in the premises, (2) whether the person was legitimately on the premises, (3) whether the person had complete dominion and control and the right to exclude others, (4) whether the person took precautions customarily taken by those seeking privacy, (5) whether the person put the property to some private use, and (6) whether the claim of privacy is consistent with historical notions of privacy. ***Id.***, ¶15. However, these factors are not controlling or exclusive. ***Id.*** The controlling standard is the totality of the circumstances. ***Id.***

¶4 Applying these standards here, we conclude that Cotton failed to establish that he had a reasonable expectation of privacy in either the vehicle or the black bag found in the vehicle. We therefore affirm the trial court's order denying Cotton's motion to suppress.[2]

¶5 The arresting officers, Trinidad Rodriguez and Brian Kobelinski, testified at the suppression hearing. The trial court made findings of fact after hearing their testimony and a tape of testimony given by Tanesha Glover at a revocation hearing at which she discussed Cotton's arrest.

¶6 The trial court found that on October 9, 2008, Rodriguez and Kobelinski were in full uniform and parked in an alley in a marked squad car when they observed a black Chevrolet Impala turn toward them. The officers

[2] The trial court concluded that Cotton had no reasonable expectation of privacy in the area searched. It also determined that the search of the bag was proper as a search incident to arrest and as an inventory search, and that it was permissible under the plain view doctrine. Because we conclude that Cotton lacked a reasonable expectation of privacy in the area and object searched and therefore lacked standing to bring the motion to suppress, we need not address the remaining grounds considered by the trial court in denying Cotton's motion. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (If this court decides a case based on one issue, it need not decide others).

testified that the Impala abruptly slowed and pulled over to the curb, and that the driver exited the vehicle and walked up to the door of a duplex, where he appeared to knock, although they heard no sound. Rodriguez indicated that the driver, later identified as Cotton, went back to the Impala, opening the passenger door and illuminating the inside of the vehicle so that the officers could see that no one else was in it. After locking the door with a remote control key, Cotton remained on the sidewalk on his cell phone for a few minutes, ultimately walking back up to the duplex door, at which time Glover answered and spoke with Cotton.

¶7 Rodriguez indicated that because the Impala had stopped abruptly when it came in view of the squad car, and because individuals sometimes pretend to know people in a house to avoid being stopped by police, the officers pulled closer to the Impala and ran a license check on its plate. When a report came back indicating that the license plate was stolen, the officers approached Cotton, who immediately put his hands in the air. Rodriguez asked Cotton if he had a driver's license, and Cotton replied that he did not. He also stated that he was on probation, and, according to Rodriguez, smelled of burnt marijuana.

¶8 The trial court found that the officers then escorted Cotton to the squad car and asked him to sit in the back seat because they were checking on whether the Impala was stolen. Rodriguez testified that Cotton then pulled down his pants and said he had nothing on him. Rodriguez testified that after pulling his pants back up, Cotton attempted to flee, and struggled with the officers before they subdued and handcuffed him.[3]

[3] The trial court found that the police had probable cause to arrest Cotton when they escorted him to the squad car and seized him. Cotton does not challenge this determination on appeal.

¶9 After securing Cotton, the officers shined a flashlight in the window of the Impala and observed a marijuana blunt in the center ashtray in plain sight. Kobelinski testified that prior to observing the marijuana blunt, he also observed the VIN number of the vehicle. The officers testified that although the VIN number matched the Impala and the vehicle was not reported as stolen, the vehicle bore stolen plates and, despite attempting to do so, they were unable to contact the vehicle's owner.

¶10 The trial court found that after the officers observed the marijuana blunt in the ashtray and checked on the VIN number, Kobelinski took the keys from Cotton and unlocked the vehicle to search it. Kobelinski testified that he observed a black bag which was a little bigger than a purse sitting on the front passenger seat. He testified that he opened it and discovered multiple bags of marijuana.

¶11 The trial court's findings of fact are not clearly erroneous. Based upon its findings, we agree with the trial court that Cotton did not have a reasonable expectation of privacy in the vehicle or the black bag.

¶12 Cotton did not have a driver's license and was driving a vehicle with stolen license plates. He did not own the vehicle, and the owner could not be located. Moreover, as noted by the trial court, nothing in the suppression record established that the owner of the vehicle had given Cotton permission to drive it.

¶13 Under these circumstances, Cotton did not have an expectation of privacy in the car that society was prepared to recognize as reasonable. He established no ownership or property interest in the car, and established no right to exclude others from it. He presented no evidence sufficient to support a claim that he was lawfully in possession of the vehicle. A claim of a right to privacy in a

vehicle bearing stolen plates is not consistent with historical notions of privacy. Under the totality of these circumstances, Cotton had no expectation of privacy in the vehicle that society was prepared to recognize as reasonable, and no standing to challenge the search of it *Cf.* ***Bruski***, 299 Wis. 2d 177, ¶¶26-31.

¶14 For similar reasons, we conclude that Cotton lacked a reasonable expectation of privacy in the contents of the black bag. He did not testify at the suppression hearing, and therefore never testified that he had an ownership interest in the bag, that he put the bag to private use, that he objected to the opening of the bag, or that he had an actual, subjective expectation of privacy in its contents. Moreover, nothing in the record provides a basis to conclude that he had an expectation of privacy in the bag that society was prepared to recognize as reasonable.

¶15 There is a reduced expectation of privacy in vehicles. ***Id.***, ¶39. Moreover, Cotton left the bag in a vehicle in which he had no reasonable expectation of privacy. The bag was left in plain view on the passenger seat of a car that did not belong to him and that displayed stolen license plates. As noted by the State, for all the police knew the bag belonged to the car's owner, who could not be located.

¶16 Because Cotton lacked dominion and control over the car and demonstrated no right to exclude others from the car, he had no reasonable expectation that someone else, like the car's owner, might not open the bag. In addition, Cotton left the bag sitting next to contraband that was in plain view in the ashtray, rendering any claim of privacy inconsistent with historical notions of privacy. Nothing in the evidence indicates that the bag was sealed or locked in any manner or that it had any identifying information on its exterior. "Courts

'have been reluctant to find a reasonable expectation of privacy where the circumstances reveal a careless effort to maintain a privacy interest.'" ***Id.***, ¶40 (quoting ***United States v. Angevine***, 281 F.3d 1130, 1135 (10th Cir. 2002).

¶17 Based on the totality of the circumstances, Cotton had no legitimate or justifiable expectation of privacy in the bag. *Cf.* ***Bruski***, 299 Wis. 2d 177, ¶¶38-43. His motion to suppress therefore was properly denied.

By the Court.— Judgment affirmed.

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