COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2470-CR **Cir. Ct. No. 2008CF1041**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODNEY D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK and PAUL R. VAN GRUNSVEN, Judges.[1] *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

[1] The Honorable Timothy M. Witkowiak decided the suppression motion; the Honorable Paul R. Van Grunsven handled the plea hearing and entered the final judgment.

¶1 FINE, J. Rodney D. Johnson appeals a judgment entered on his guilty plea to unlawfully possessing cocaine with intent to deliver, as a second or subsequent drug crime. *See* WIS. STAT. §§ 961.41(1m)(cm)2. & 961.48. Johnson argues that the trial court should have suppressed the drug evidence because, he claims, the police violated his constitutional rights.[2] We affirm.

I.

¶2 According to testimony at the suppression hearing, a confidential informant told police that a man matching Johnson's description "would be in possession of suspected cocaine base and driving an older model GMC Jimmy, white in color … to 1828 South 19th Street." The informant said that the GMC Jimmy would be there on February 27, 2008. Milwaukee Police Officers Jason Enk and Jose Viera saw the car in that area on February 27, 2008, at approximately 10:15 at night. The car had a cracked windshield. Before the police could stop the car, however, it pulled to the curb in front of 1828 South 19th Street. Johnson, who was driving, got out. Johnson started walking toward the house at 1828 South 19th Street. Enk and Viera parked, got out of their car and Viera said, "Excuse me. Can I talk to you? Milwaukee Police." Johnson turned, looked at the officers, but then kept walking. Viera asked, "Can you stop, please? Police. Can you take your hands out of your pocket?"[3] Johnson took his hands out of his pocket and tossed four baggies to the ground. One of the baggies the officers recovered had 3.3 grams of marijuana, and the others had 10.87 grams of

[2] A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. *See* WIS. STAT. § 971.31(10).

[3] The Record indicates the plural "hands" but the singular "pocket."

cocaine base. Johnson, according to Viera, then "put his hands back into his pocket or towards his waistband area." The trial court found that Johnson then saw "Officer Enk recover the drugs." Viera then told Johnson to get down, but Johnson kept walking towards the house. As phrased by the trial court, "once the defendant reached the end of the porch [at 1828 South 19th Street], [Viera] threw him to the ground."

¶3 Johnson wanted the trial court to suppress the baggies, claiming that the officers illegally stopped and seized him. When the trial court refused, Johnson pled guilty to the cocaine charge. The State dismissed the marijuana charge. Johnson argues that the officers acted unlawfully because, he contends, neither the cracked windshield nor the drug tip gave the officers sufficient cause under the Fourth Amendment to stop and seize him.[4]

II.

¶4 In reviewing a trial court's order refusing to suppress evidence, we uphold a trial court's findings of historical fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995); *see also* WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Whether a search or seizure violates the Fourth Amendment,

[4] Johnson also argues in passing that the trial court should have suppressed the drugs under WIS. CONST. art. I, § 11, but he does not point out how the result would be different if analyzed under that provision rather than the Fourth Amendment, the law of which we generally apply to the Wisconsin provision. *See* ***State v. Malone***, 2004 WI 108, ¶15, 274 Wis. 2d 540, 550–551, 683 N.W.2d 1, 6. Accordingly, we do not address it. *See* ***State v. Huebner***, 2000 WI 59, ¶25, 235 Wis. 2d 486, 496–497, 611 N.W.2d 727, 732 (rejecting undeveloped argument citing the Wisconsin Constitution where cases under the United States Constitution were dispositive).

however, is a question of law that we review *de novo*. ***State v. Richardson***, 156 Wis. 2d 128, 137–138, 456 N.W.2d 830, 833 (1990).

¶5 Although a cracked windshield is a traffic violation, WIS. ADMIN. CODE §§ TRANS. 305.05(43) and 305.34(3)(a) (2010), and would have permitted the officers to stop Johnson's car for that reason, *see* ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696, 698–699 (Ct. App. 1996), the officers here did not stop Johnson's car; rather, as noted, he stopped it himself.

¶7 When Johnson got out of the car with his hands in his pocket, the officers prudently and lawfully asked him to take them out. First, they had a right to try to talk to Johnson about the cracked windshield and the drug information, *see* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991) (Police may go over to a person and ask questions even though they do not have the requisite "reasonable suspicion" that would justify a seizure.), especially since the informant's tip about the cocaine was corroborated by what and where Johnson was driving (the GMC Jimmy at the address on South 19th Street); ***State v. Romero***, 2009 WI 32, ¶21, 317 Wis. 2d 12, 29–30, 765 N.W.2d 756, 764 (corroboration of details can fill interstices of an informant's reliability even though the informant's "past performance of supplying information to law enforcement" is unknown) (issuance of search warrant).

¶8 Second, the officers suspected Johnson of drug crimes, and drugs and guns "'go hand in hand.'" *See* ***State v. Guy***, 172 Wis. 2d 86, 96, 492 N.W.2d 311, 315 (1992) ("'drug dealers and weapons go hand in hand'") (quoted source omitted).

¶9 Third, police officers risk death or serious injury when they approach someone irrespective of that person's connection with illegal drugs. *See*

State v. Buchanan, 2011 WI 49, ¶18, 334 Wis. 2d 379, 395–396, 799 N.W.2d 775, 784 ("As we have frequently noted, traffic stops are dangerous for law enforcement, and permitting a limited search is a reasonable way to balance the competing interests involved."). Indeed, ***Terry v. Ohio***, 392 U.S. 1, 23–24 (1968), recognized this more than forty years ago, pointing out that "every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." ***Id.***, 392 U.S. at 23. The officers thus had the right to see Johnson's hands so they would not be surprised if he pulled out a weapon. *See* ***id.***, 392 U.S. at 26–27 ("[A] perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime."). When Johnson pulled his hands out of his pocket in response to the officer's lawful command, he thus had not yet been "stopped" or "seized." When he discarded the four baggies, he abandoned them, and officers may lawfully seize abandoned property. *See* ***Molina v. State***, 53 Wis. 2d 662, 668–669, 193 N.W.2d 874, 877–878 (1972). The trial court did not err in denying the motion to suppress. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.