COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2480-CR **Cir. Ct. No. 2009CF002178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVELL MARCEL GARRETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Lavell Marcel Garrett appeals from a judgment of conviction, entered on his guilty pleas, for possession of a firearm by a felon and

possession of THC (second or subsequent offense), contrary to WIS. STAT. §§ 941.29(2) and 961.41(3g)(e) (2009–10).[1] Garrett argues that the trial court erroneously denied his motion to suppress evidence seized from a car he was driving pursuant to an inventory search after a traffic stop. We affirm.

BACKGROUND

¶2 The following facts were presented at the suppression hearing. The trial court made findings consistent with the testimony of City of Milwaukee Police Department officer Michael Martin, the only witness. Those facts are unchallenged on appeal, except that Garrett suggests law enforcement had a different motive for towing the car Garrett was driving and conducting an inventory search.

¶3 Martin and his partner, Robert Thiel, were on patrol shortly after midnight when they saw a car being operated with a defective taillight. They stopped the car and spoke with both the driver, Garrett, and his male passenger. Both Garrett and his passenger provided identification to the officers, who returned to their squad car to run background checks on the men.

¶4 When the officers returned to the car, Thiel saw a driver's license on the floor and asked Garrett about it. Thiel examined the license and determined that it belonged to Garrett and that Garrett had originally provided a driver's license that was not his. Thiel placed Garrett under arrest for obstruction.

[1] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

¶5 Martin testified that once a decision was made to arrest Garrett, he and Thiel decided to tow the car for safekeeping and conduct an inventory search of its contents. Martin noted several reasons for this decision. First, there appeared to be valuable property on the back seat, on the back seat floor and on the front seat between the passenger and the driver, including silver necklaces, a fur-style jacket, and some stereo speaker covers. Martin said that the car was stopped in an area where there is "a lot of entry to autos" and that he was concerned that the car would be broken into or stolen. Second, the passenger did not have a valid driver's license, so he could not drive the car. Third, the car's registration was suspended, so it was not supposed to be left parked on the street. Fourth, Garrett was not the registered owner of the car and he told the officers the car was not his. Martin explained that the registered owner of the car was a woman for whom they did not have a phone number.[2]

¶6 Martin said that he and Thiel followed the police department's "safekeeping tow" policy. While waiting for the tow truck, they conducted "an inventory search," which entailed collecting the valuable items and inventorying them under Garrett's name. They "searched the entire vehicle which is accessible by key or unlocked," per the department's policy. They found a firearm and marijuana in the trunk.

¶7 On cross-examination, Garrett's lawyer asked Martin about observations he made as he approached the car after checking the occupants'

[2] Garrett did not testify at the suppression hearing. According to the criminal complaint, he told the officers while they were waiting for the tow truck that the car belonged to his girlfriend. There was no testimony at the suppression hearing suggesting that Garrett told the officers how to contact his girlfriend so that they could ask her to retrieve the vehicle.

identification. Martin testified that he saw Garrett and his passenger "appear to be exchanging something." Garrett later conducted a pat-down search of the passenger and found over $1000 in cash in a clear plastic baggie. Garrett's lawyer asked Martin whether he was concerned, prior to searching the car, that Garrett and the passenger were involved in drug dealing, in light of their movements in the car and the discovery of the baggie of cash. Martin replied: "Not at that point, no."

¶8 The trial court found Martin's testimony to be credible. It further found that the officers acted reasonably when they decided to tow the car. It cited several reasons that made towing the car reasonable: (1) Garrett had "disavowed the car," indicating he did not own it; (2) the passenger did not have a valid driver's license; (3) there was a risk the car would be broken into at that location, when there were items of "apparent value" clearly visible in the car; (4) moving the valuable property out of sight to the trunk would require the officers to touch the property, inviting allegations that some property was lost or stolen, rather than placed in the trunk; (5) they did not have "readily available phone numbers or contact information" for the owner; and (6) it was after midnight.

¶9 The trial court rejected Garrett's argument that "the real purpose of inventorying and towing [the] vehicle [was] to see what else was in the car that might be related to this $1,000" that was found on the passenger. The trial court explained: "I have to look at the evidence and the credibility of the witness, and I think that there is no evidence to support that speculation or that ulterior motive."

¶10 The trial court concluded that "under all the circumstances" the officers made "a reasonable decision" to tow and conduct an inventory search of the car. Therefore, it denied the motion to suppress.

¶11 Garrett subsequently pleaded guilty pursuant to a plea bargain. He was sentenced to two years of initial confinement and two years of extended supervision for possessing a firearm, concurrent with eighteen months of initial confinement and eighteen months of extended supervision for possessing THC.

DISCUSSION

¶12 Garrett contends that the gun and marijuana were illegally seized from his trunk and that the trial court should have suppressed the illegally seized evidence. When reviewing a trial court's decision on a motion to suppress, we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Knight***, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 311, 606 N.W.2d 291, 295 (Ct. App. 1999). We independently review whether a search was reasonable under the Fourth Amendment. ***Ibid.*** In this case, the facts are largely undisputed. Our task is to determine whether the facts demonstrate that the Fourth Amendment protection against illegal seizure was violated by the inventory search.

¶13 "[A]n inventory search is a 'search' within the meaning of the fourth amendment," but "it is also a well-defined exception to the warrant requirement." ***State v. Weber***, 163 Wis. 2d 116, 132, 471 N.W.2d 187, 194 (1991) (citation omitted). ***Weber*** recognized that inventory searches are used to protect the owner's property, protect police against claims or disputes over lost or stolen property, and protect the police from potential danger. *See* ***ibid.*** ***Weber*** discussed the analysis used to determine whether there has been a Fourth Amendment violation:

> An inventory search is administrative by nature, not an investigation motivated by a search for evidence. The justification for an inventory search, therefore, does not rest on probable cause. To determine the reasonableness of an inventory search, we must balance its intrusion on the

> defendant's fourth amendment interests against its promotion of legitimate governmental interests. The reasonableness must be based on the facts and circumstances of each case. This is a two-step process, involving the reasonableness of the intrusion in the first instance, followed by the reasonableness of the scope of the intrusion.

Id., 163 Wis. 2d at 132–133, 471 N.W.2d at 194 (citations omitted).

¶14 Here, Garrett challenges only the first step in the two-step process: the reasonableness of the intrusion. *See* ***ibid.*** He argues that the decision to impound the car was unreasonable and, therefore, any subsequent search was illegal. Specifically, he asserts that the officers should have tried to contact the car's owner to remove the vehicle, or they should have left it parked on the side of the road, where it was not impeding traffic. He also argues that "the decision to impound the vehicle may have been based on law enforcement's hunch that other criminal activity may have occurred." We are not convinced by these arguments.

¶15 We begin with Garrett's last argument: that the police officers were impounding the car so that they could search it for evidence of criminal activity, rather than acting pursuant to their caretaking function. The trial court explicitly considered this argument and rejected it, finding that there was "no evidence to support that speculation or that ulterior motive." We have no reason to disturb the trial court's credibility assessment and finding that the officers decided to impound the car for legitimate caretaking reasons, rather than to search for evidence of criminal activity. *See* ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981) (A judge, when acting as the trier of fact, is "the ultimate arbiter of the credibility of witnesses.").

¶16 Next, we disagree with Garrett that it was unreasonable for the officers to impound the vehicle under the circumstances of this case. There was

no licensed driver immediately available to drive the car, and the car itself was not properly registered such that it could be driven on city streets. It is unknown whether the officers could have found a telephone number to contact the owner. Further, even if the officers could have found a telephone number, they would have been forced to call the owner in the early morning hours and wait for her to come to the scene, or they would have had to risk leaving the apparently valuable property in plain view in an area that experiences frequent auto thefts. Given these facts, we agree with the trial court that the decision to impound the car was reasonable.

¶17 Garrett argues that ***United States v. Duguay***, 93 F.3d 346 (7th Cir. 1996), compels a different result. In that case, the court concluded that the police officers who impounded the defendant's car had "not articulate[d] a constitutionally legitimate rationale" for doing so. *See* ***id.*** at 352. The court held that a desire to protect the property of those being arrested is not a sufficient reason to impound a car. *See* ***id.*** at 352–353 (Illinois law does not impose on police officers a duty "to protect the property of individuals from tort or crime," or a "duty to incarcerated persons to protect private property from private injury."). The court also faulted the officers for not allowing the car's passenger, who had keys to the car, to remove the car from the street. *See* ***id.*** at 353. The court concluded: "The policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets." ***Ibid.***

¶18 ***Duguay*** does not control the outcome of this case. First, as the State points out, it is a lower federal court decision, which is not binding on Wisconsin state courts. *See* ***State v. Webster***, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474, 478 n.4 (1983). Moreover, the facts of the instant case are different. Here, the

police officers considered whether the defendant could provide for the car's removal and concluded that the answer was no, given that Garrett said the car was not his, no licensed drivers were available to move it, it was not registered, the owner's telephone number was not known to the police, and it was after midnight. ***Duguay*** is clearly distinguishable.

¶19 Applying the principles outlined in ***Weber***, we conclude that the officers' decision to impound Garrett's car and conduct an inventory search was reasonable. Therefore, the inventory search did not violate the Fourth Amendment and the trial court properly denied the motion to suppress.

¶20 Garrett has not challenged his conviction on any other grounds. We affirm the judgment.

By the Court.—Judgment affirmed.

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