

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP483-CR

Cir. Ct. No. 2010CM478

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILSON J. BEHLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Wilson Behling appeals a judgment of conviction for possession of marijuana. He asserts the court erred by denying his suppression motion because the police unlawfully seized his backpack. We affirm.

BACKGROUND

¶2 Behling was charged with possession of marijuana and possession of drug paraphernalia after police, during a search warrant execution, found a small amount of marijuana and a glass pipe in Behling's backpack. Behling brought a suppression motion, arguing police improperly seized his backpack prior to obtaining the search warrant.²

¶3 At the suppression hearing, officer James Hoffman testified that, while traveling in an unmarked vehicle, he observed a motorcycle speeding and began to follow it. He paced the motorcycle's speed at approximately ninety miles per hour, and called for assistance. Hoffman explained he did not activate his emergency lights because he feared that if he attempted to stop the motorcycle before assistance arrived, it would escape.

¶4 Hoffman and the motorcycle approached an intersection that leads to a county park known as "The Rock." As they approached the intersection, Hoffman observed another motorcycle traveling toward them. This motorcycle, a Harley-Davidson, turned on the road that leads to the Rock. The motorcycle Hoffman was following also turned on the road.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Behling conceded the search warrant, which was based in part on information obtained after the seizure, was proper.

¶5 The Rock is located on the Red River and features a swimming area. Criminal activity frequently occurs in the park. Hoffman testified that he has responded to the park for reports of “underage alcohol, drug activity, fights, vandalism, [and] threats.” He also explained the Town of Richmond requested extra patrol of the park.

¶6 After the motorcycle Hoffman was following turned on the road leading to the Rock, it accelerated to catch up with the Harley, drove next to it for a short distance, and then accelerated and passed the Harley. When the motorcycles reached the parking lot at the end of the road, both motorcycles passed between the parking posts and drove down toward the river.

¶7 Hoffman parked his vehicle in the lot and walked down to the river. As he walked toward the river, he observed the motorcycle drivers, who had parked about thirty-five feet apart, were talking to each other.

¶8 Hoffman, who was dressed in plain clothes, approached the driver of the motorcycle he was following and identified himself as a police officer. The driver, who was subsequently identified as Behling, was holding a backpack that he had been wearing. Behling put the backpack down away from where he was standing and walked toward Hoffman.

¶9 Hoffman told Behling that he was being stopped for speeding, and Behling admitted he was speeding. Hoffman testified that, at that point, he knew he was going to give Behling traffic citations, but explained “[the traffic stop] was by no means complete because [he] would still have to issue citations and [he] couldn’t do that by [him]self with those two guys down there.”

¶10 Hoffman then asked Behling why he was down by the river. Hoffman testified “[Behling] didn’t really have a reason for being down there except he was just taking a break.” Hoffman asked him if he knew the Harley driver. Behling said, “No,” but after a few more questions, Behling stated he had seen the other driver before at the Rock, but did not really know him.

¶11 Hoffman approached the Harley driver, who was subsequently identified as Steven Verhein, and asked Verhein if he knew Behling. Verhein responded, “No.” Hoffman informed Verhein that Behling said he had seen Verhein before. Verhein told Hoffman that he had seen Behling before.

¶12 Hoffman explained that it was “obvious to [him]” that Behling and Verhein were meeting because Behling passed the other driver on the road, both drove down to the river, and, once there, they started talking to each other. According to Hoffman’s report, which was admitted into evidence, Hoffman explained:

Based on my training and experience as a drug investigator I know secluded places like this park are prime areas for covert drug purchases and drug use and given the fact that both subjects drove past the parking area to a[n] even more secluded spot aroused my suspicions of illegal activity.

Hoffman also determined Behling and Verhein had given inconsistent stories about whether they knew each other. Hoffman found it suspicious that Behling had appeared to distance himself from the backpack he was holding before approaching Hoffman. In his report, Hoffman explained, “through my training and experience as a drug investigator I have found a person who has contraband will attempt to distance [himself] from the contraband and or distract an officer from checking a certain area.” Finally, Hoffman observed that Behling was nervous.

¶13 Because he believed Behling and Verhein were meeting, he “felt [his] safety could be in jeopardy with the two individuals and being by myself in a secluded area.” Hoffman asked Behling if he could frisk him for weapons. Behling consented, and Hoffman found no contraband.

¶14 Hoffman then asked Behling if he had anything illegal in his backpack. Behling responded, “No,” and consented to a search of the backpack. Behling retrieved the backpack but would not let Hoffman hold it. Behling opened one of the several pockets and tipped it forward. Hoffman testified there was nothing of concern in that pocket. Behling opened another pocket, but did not tip the backpack forward. When Hoffman reached for the backpack to look inside, Behling pulled the backpack away and said, “I don’t want you to search my backpack.” Hoffman testified Behling was nervous and fumbling with the backpack. Hoffman’s report indicates “[he] felt Behling had something illegal inside the pack based on his behavior and demeanor.”

¶15 Hoffman asked Behling a second time if he could search his backpack and Behling refused. Hoffman directed Behling to put his backpack on the ground and walk away from it.

¶16 During the exchange between Behling and Hoffman, Verhein walked back toward the parking lot. He was eventually stopped and questioned by the backup officers who had arrived.

¶17 According to Hoffman’s report, Hoffman then returned to his car and ran background checks on Behling and Verhein. He noted Verhein had a prior drug conviction related to marijuana. Hoffman issued Behling citations for speeding and failure to use a turn signal. Hoffman called the district attorney and

explained the situation. The district attorney advised Hoffman to seize Behling's backpack and motorcycle.

¶18 Hoffman returned to Behling, gave him the citations, and told Behling he was going to seize his backpack and motorcycle in order to obtain a search warrant for them. Hoffman told Behling that he was free to leave and an officer would give him a ride back to Shawano if he wanted.

¶19 An officer, who had been questioning Verhein, then advised Hoffman that Verhein admitted to possessing marijuana. Hoffman spoke with Verhein, verified the existence of marijuana and searched Verhein's wallet. Verhein's money was organized in such a way to make Hoffman believe Verhein was a drug dealer.

¶20 Hoffman used the information about Verhein in his affidavit for a search warrant. He obtained a search warrant for Behling's backpack and motorcycle. The search revealed a small amount of marijuana and a pipe in Behling's backpack. Nothing was found in the motorcycle.

¶21 Behling argued that, at the time of the seizure, Hoffman did not have probable cause to believe his backpack contained contraband. The circuit court determined Hoffman seized Behling's backpack after the district attorney directed him to do so and, at the moment of seizure, Hoffman had probable cause to seize the backpack based on the totality of the circumstances.

¶22 Behling pled no contest to possession of marijuana and the possession of drug paraphernalia charge was dismissed outright. The court found Behling guilty and imposed a \$250 fine.

DISCUSSION

¶23 Behling raises three arguments on appeal. First, Behling asserts Hoffman seized his backpack before the district attorney told him to do so—specifically, when Behling revoked his consent to search the backpack and Hoffman directed him to put it on the ground and walk away. Second, Behling contends Hoffman did not have probable cause to seize the backpack. Third, Behling argues Hoffman improperly prolonged the traffic stop in order to seize the backpack.

¶24 The Fourth Amendment to the United States Constitution, and Article I, Section 11 of the Wisconsin Constitution, protect “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Whether police conduct violated the constitutional guarantee against unreasonable seizures is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. We review the circuit court’s findings of historical fact under the clearly erroneous standard. *State v. Carroll*, 2010 WI 8, ¶17, 322 Wis. 2d 299, 778 N.W.2d 1. We independently apply those facts to constitutional principles. *Id.*

¶25 Behling first argues the court erred by determining the seizure occurred when Hoffman formally informed Behling his property was going to be seized. “A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Behling contends Hoffman seized his backpack when he directed Behling to put the backpack on the ground and walk away. The State has failed to respond to Behling’s “moment of seizure”

argument. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). In any event, we agree with Behling that his backpack was seized when Hoffman directed him to place it on the ground and walk away.

¶26 Behling next contends Hoffman unlawfully seized his backpack without probable cause. “Warrantless seizures of personal property ... [are] per se unreasonable within the meaning of the Fourth Amendment.” *Carroll*, 322 Wis. 2d 299, ¶18 (citing *United States v. Place*, 462 U.S. 696, 701 (1983)). There are, however, limited circumstances in which an officer may seize property without a warrant. *Id.*, ¶20. “Law enforcement agents are justified in seizing and continuing to hold a container [without a warrant] if (1) there is probable cause to believe that it contains evidence of a crime, and (2) if exigencies of the circumstances demand [the seizure].”³ *Id.*, ¶26.

¶27 Probable cause in the context of a search or seizure requires “a ‘fair probability’ that contraband or evidence of a crime will be found” in the property. *State v. Hughes*, 2000 WI 24, ¶21, 233 Wis. 2d 280, 607 N.W.2d 621 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Officers are not permitted to seize property on a mere guess that it contains contraband or evidence of a crime. *Id.*

³ We recognize that, in limited situations, officers may seize and detain personal property based only on reasonable suspicion that the property contains contraband. See, e.g., *United States v. Place*, 462 U.S. 696, 706, 709-10 (1983) (Based on the circumstances, officers were permitted to temporarily detain the luggage in order to subject it to a canine sniff; however, the luggage’s ninety minute detention was unreasonable and violated the Fourth Amendment.). Here, however, there is no indication Hoffman temporarily detained the property for a limited investigatory purpose—Hoffman was seizing the property to get a search warrant. As a result, Hoffman needed probable cause.

¶28 We conclude Hoffman had probable cause to believe Behling's backpack contained contraband or evidence of a crime. Here, Hoffman's seizure was based on the following facts: (1) Behling entered a county park where drug activity has occurred; (2) Behling drove next to another motorcycle for a short distance; (3) both motorcycles drove down to a secluded spot on the river; (4) Hoffman's training and experience as a drug investigator provided him with the knowledge that covert drug transactions occur in secluded locations; (5) Hoffman observed Behling and Verhein talking; (6) Behling put his backpack down away from himself before approaching Hoffman; (7) Hoffman's training and experience provided him with the knowledge that an individual who has contraband usually attempts to distance himself from the contraband; (8) Behling appeared nervous; (9) Behling consented to a search of his backpack but subsequently revoked his consent when Hoffman wanted to look in a specific pocket; and (10) Behling fumbled with his backpack.

¶29 Contrary to Behling's and Verhein's statements that they had only seen each other around before, it was objectively reasonable for Hoffman to conclude Behling's and Verhein's secluded encounter was in fact a prearranged meeting. This, together with Behling's nervous behavior, his actions with the backpack, and Hoffman's knowledge and experience with drug transaction locations and how people carrying contraband react to an officer's presence, established a "fair probability" that Behling's backpack contained contraband or evidence of a crime. *See Carroll*, 322 Wis. 2d 299, ¶28. The court did not err by failing to grant Behling's suppression motion.

¶30 Finally, Behling contends Hoffman improperly prolonged his traffic stop in order to seize the backpack. Behling failed to raise this argument before the circuit court. We will not consider it. *See State v. Huebner*, 2000 WI 59,

¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (We need not address arguments raised for the first time on appeal.).

By the Court.—Judgment affirmed.

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

