COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1363-CR **Cir. Ct. No. 2012CM389**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL R. FOLKMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Daniel Folkman appeals a judgment of conviction for operating while intoxicated, second offense. Folkman argues the circuit court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

erred by denying his suppression motion because the officer ran a query on Folkman's vehicle registration and driver's license information for no apparent reason. We conclude Folkman has failed to establish he had a reasonable expectation of privacy in the registration and license information and therefore has not triggered the Fourth Amendment's prohibition against unreasonable searches and seizures. We affirm.

BACKGROUND

¶2 The facts are undisputed. On May 27, 2012, sheriff's deputy Ben Klenke was on patrol and observed the license plate of an oncoming vehicle. Klenke ran a registration check through the eTime system on his squad car's computer. Klenke learned the vehicle was registered to Folkman. Klenke then ran Folkman's name through the eTime system and discovered Folkman's driver's license was expired. Klenke stopped the vehicle, and Folkman was driving. Ultimately, Folkman was arrested for, and charged with, operating while intoxicated.

¶3 Folkman brought a suppression motion, challenging the stop. He conceded Klenke lawfully viewed his license plate number and that, once Klenke knew the vehicle's owner was not validly licensed, Klenke had reasonable suspicion to stop the vehicle. Folkman argued the stop was unlawful because Klenke needed, but did not have, "some exigent circumstance" in order to begin querying registration and driver's license information on the eTime system.

¶4 The circuit court denied Folkman's suppression motion. It observed the question presented was "whether the running of … registration information … violate[s] any type of Fourth Amendment issues." The court stated to answer that question it needed to determine whether there is "a reasonable privacy expectation

that individuals, including law enforcement officers, will not be able to check the registration[.]" The court concluded individuals do not have a reasonable expectation of privacy in registration or license information. It reasoned, "when you have your plate, it's made visible" and must remain visible per law. The court explained a license plate is required to be visible so that

> officers can see your plate. Also, you have to register your vehicle with the State. Everyone knows that it is subject to check. It can be checked by law enforcement. So I don't think that anyone has a reasonable expectation of privacy that an officer will not run that plate. So, I do believe that an officer can legally, under … our State law and under the US Constitution, … run a license check on your vehicle without having probable cause that a crime was committed.

¶5 Folkman subsequently pleaded no contest to operating while intoxicated, and the circuit court found him guilty. He appeals.

DISCUSSION

¶6 When we review the denial of a suppression motion, we uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Sykes***, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277. We then independently review the circuit court's application of constitutional principles to those facts. ***Id.***

¶7 The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures. Whether police conduct constitutes an unreasonable search and seizure "depends, in the first place, on whether the defendant had a legitimate, justifiable or reasonable expectation of privacy that was invaded by government action." ***State v. Rewolinski***, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990). "[T]he constitutionality or reasonableness of the government conduct does not come into question unless and until it is

established that [the defendant] had a legitimate expectation of privacy that was invaded by government conduct, i.e., that a search or seizure within the meaning of the [F]ourth [A]mendment even occurred." ***Id.*** at 12-13. Once it is established that the defendant was subject to a search or seizure, the government conduct must have been reasonable in order to be constitutional. ***Id.*** at 13.

¶8 Whether an individual has a reasonable expectation of privacy in an area depends on a two-part inquiry. ***Id.*** A court first determines "whether the individual by his conduct exhibited an actual, subjective expectation of privacy." ***Id.*** If the individual shows he or she has the requisite expectation of privacy, the court next determines whether the expectation of privacy is one that society is willing to recognize as reasonable. ***Id.*** The defendant bears the burden of proving a reasonable expectation of privacy by a preponderance standard. ***Id.*** at 16. "Whether sufficient facts have been brought forth to demonstrate a reasonable expectation of privacy must be determined on a case-by-case basis." ***State v. Earl***, 2009 WI App 99, ¶9, 320 Wis. 2d 639, 770 N.W.2d 755.

¶9 On appeal, Folkman does not directly address the circuit court's conclusion that he lacked a reasonable expectation of privacy in his registration and license information on the eTime system. Instead, he relies on three cases—***Delaware v. Prouse***, 440 U.S. 648 (1979); ***State v. Lord***, 2006 WI 122, 297 Wis. 2d 592, 723 N.W.2d 425; and ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923—and contends these cases establish officer Klenke needed "exigent circumstances" before he could query information about Folkman's registration and license.

¶10 In ***Prouse***, an officer *stopped* a vehicle simply to check the vehicle's registration and the driver's license. ***Prouse***, 440 U.S. at 650. The Court held,

> except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id. at 663. In ***Lord***, our supreme court summarily reversed a court of appeals' opinion that held an officer may stop a vehicle to verify the registration of the vehicle if the vehicle has a temporary license plate. ***Lord***, 297 Wis. 2d 592, ¶¶1-2. The ***Lord*** court held that ***Prouse*** clearly prohibited the act of stopping a vehicle and detaining a driver without probable cause or reasonable suspicion simply to check the registration and license information. ***Lord***, 297 Wis. 2d 592, ¶7.

¶11 Folkman argues "[t]he only difference between the facts in ***Lord*** and the instant case is that the officer physically stopped Lord's car in order to check his vehicle registration because Lord was displaying temporary plates that could not be checked through the eTime system." He contends, "carrying the holding of ***Lord*** to its logical conclusion, since Deputy Klenke had no knowledge of any other independent exigent circumstances regarding [Folkman] or his vehicle, his running the vehicle's license plate was unreasonable, and per ***Prouse***, a violation of [Folkman's] 4th Amendment right against unreasonable search[es] and seizure[s]."

¶12 The State responds Folkman's arguments "seem[] to infer a right to privacy in a person's registration or driver's licensing." We agree. ***Prouse*** and ***Lord*** are not dispositive. There is a considerable difference between an officer stopping, or seizing, a vehicle to check the registration and license information and an officer running registration and license queries in a law enforcement database. In the former situation, it is well-established that an individual possesses "a

reasonable expectation of privacy, under the Fourth Amendment and art. I, sec. 11 [of the Wisconsin Constitution], to travel free of any unreasonable governmental intrusion." ***State v. Harris***, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996). Because individuals have a reasonable expectation of privacy to travel free from government intrusion, any intrusion on an individual's travel must be reasonable to be constitutional. *See* ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, … or have grounds to reasonably suspect a violation has been or will be committed." ***Id.*** (citation omitted).

¶13 However, simply because an individual has a reasonable expectation of privacy to travel does not mean the individual automatically has the same reasonable expectation of privacy in registration and license information contained in a law enforcement database such that the officer needs probable cause or reasonable suspicion before the officer may query registration and driver's license information. As previously stated, "whether sufficient facts have been brought forth to demonstrate a reasonable expectation of privacy must be determined on a case-by-case basis." ***Earl***, 320 Wis. 2d 639, ¶9. Neither ***Prouse*** nor ***Lord*** establish Folkman has a reasonable expectation of privacy in his registration and driver's license information.

¶14 Folkman next makes an anticipatory argument that ***Newer*** supports his assertion that officers need "exigent circumstances" before they may lawfully query registration and driver's license information. The State argued in the circuit court, and now on appeal, that ***Newer*** is "directly on point" with its position that law enforcement officers are permitted to query registration and driver's license information. Folkman emphasizes that, in ***Newer***, the officer observed the

defendant traveling three miles over the posted limit before the officer queried information about the defendant's vehicle registration and driver's license. *See* ***Newer***, 306 Wis. 2d 193, ¶3. Accordingly, Folkman asserts the officer in ***Newer*** had reasonable suspicion before he queried the information.

¶15 ***Newer***, however, is not helpful to either party. The issue in ***Newer*** was whether an officer has reasonable suspicion to stop a vehicle if the officer knows the vehicle's owner has a revoked license, but the officer does not know who is actually driving. ***Id.***, ¶1. ***Newer*** did not address whether individuals have a reasonable expectation of privacy in registration and license information contained a law enforcement database such that the Fourth Amendment is implicated by the officer's act of querying information in his or her onboard computer. Therefore, contrary to the State's assertion, the case is not "directly on point." Additionally, although the facts of the case established the officer may have had reasonable suspicion of a traffic violation before he queried the information,[2] it does not automatically follow that there is a reasonable expectation of privacy in that information.

¶16 Finally, in response to the State's argument that Folkman does not have a reasonable expectation of privacy in the registration and license information, Folkman argues in his reply brief that he has an expectation of privacy in the information because it is "inaccessible to civilians, and is only usable by government officers in the exercise of their police powers[.]" He then likens the State's collection of registration and driver's license information to the

[2] We observe the ***Newer*** court stated it did not consider whether the officer's observation of the defendant's speeding provided an independent basis for the stop. ***State v. Newer***, 2007 WI App 236, ¶4 n.2, 306 Wis. 2d 193, 742 N.W.2d 923.

National Security Agency's purported "hacking" and collection of personal emails and telephone conversations. He asserts that, because the federal government has stated it will only examine the information it collected if it has a valid reason to do so, it must follow that "Deputy Klenke had every right to access the eTime system so long as he has a valid reason for doing so."

¶17 Folkman's argument, however, fails to establish he has a reasonable expectation of privacy in his registration and license information. As previously stated, an individual has a reasonable expectation of privacy if the individual has a subjective expectation of privacy that society recognizes as reasonable. *See* ***Rewolinski***, 159 Wis. 2d at 13. That individuals have an expectation of privacy in personal emails and telephone conversations that were collected through "hacking" does not mean individuals have the same expectation of privacy in vehicle registration and licensing information, which, as the circuit court observed, is information that individuals are required to submit to the state.

¶18 In conclusion, Folkman has the burden of proving by a preponderance of the evidence that he has a reasonable expectation of privacy in the information. *See* ***id.*** at 16. Because he failed to establish he has a reasonable expectation of privacy in the information, Folkman has not triggered the Fourth Amendment's prohibition against unreasonable searches and seizures. *See* ***id.*** at 12-13.

By the Court.—Judgment affirmed.

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