

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2015

Diane M. Fremgen
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. 2014AP658-CR

Cir. Ct. No. 2012CF199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID WINTERS, JR.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Reversed and cause remanded for further proceedings.*

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. The State appeals a pretrial order suppressing evidence seized from the pocket of a jacket taken from a van during the joint investigation of a traffic accident and an altercation at a bar. The State contends

that the evidence was admissible either under the automobile exception to the warrant requirement or as a search for intoxicants incident to an OWI arrest. For the reasons discussed below, we agree that the evidence was admissible under the automobile exception to the warrant requirement. We therefore reverse the suppression order and remand for further proceedings, without addressing the State's alternative search-for-intoxicants argument.

BACKGROUND

¶2 Police officers who were dispatched to the scene of a traffic accident observed that the two occupants of a white van involved in an accident matched the description of two subjects who had earlier fled from a bar in a white van following an incident reportedly involving a firearm. While EMS personnel worked on the van's injured passenger, Winters, one of the officers took photographs of the accident scene and observed on the roof of the van a clear plastic baggie with foil packets containing a white powdery substance that looked like cocaine. After Winters was transported away to a hospital and the driver of the vehicle was secured in the back of a squad car under arrest for OWI, the police conducted a search of the van, specifically looking for the firearm reportedly involved in the bar incident.

¶3 While searching for the firearm, one of the officers removed a plaid jacket from the van that matched the description of what one of the suspects from the bar incident had been wearing. The jacket was heavy enough that one of the investigating officers could not determine merely by holding it whether it might contain a firearm. That officer checked the pocket of the jacket and found a baggie full of what turned out to be the controlled substance commonly known as Ecstasy.

¶4 Winters filed a motion to suppress any and all evidence seized as a result of a search of the jacket, arguing that the search was unreasonable because it was conducted without a warrant or pursuant to a recognized exception to the warrant requirement. After a hearing, the circuit court granted the motion to suppress. The State moved for reconsideration, which was denied. The State appeals.

STANDARD OF REVIEW

¶5 When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless those findings are clearly erroneous. *State v. Sveum*, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. *See id.*

DISCUSSION

¶6 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect the right to be free from unreasonable searches.¹ *State v. Dearborn*, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. A warrantless search is per se unreasonable unless it falls within a clearly delineated exception. *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430.

¹ Due to the similarity of article I, section 11 of the Wisconsin Constitution to the Fourth Amendment of the United States Constitution, Wisconsin courts look to the United States Supreme Court's interpretation of the Fourth Amendment for guidance in construing the state constitution. *See State v. Roberts*, 196 Wis. 2d 445, 452-53, 538 N.W.2d 825 (Ct. App. 1995).

¶7 Winters argues that the warrantless search of the van in this case fell outside the established parameters for searching an automobile in conjunction with the arrest of one of its occupants. *See generally Arizona v. Gant*, 556 U.S. 332, 350-51 (2009) (search incident to arrest authorized “only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest”). The State argues that the search was valid incident to arrest and, alternatively, contends that the search was valid under the automobile exception to the warrant requirement. As noted, we agree with the State’s automobile exception argument.

¶8 It is well established that the expectation of privacy in an automobile is considerably less than in a home or office. *State v. Weber*, 163 Wis. 2d 116, 138, 471 N.W.2d 187 (1991). A police officer may reasonably search for contraband or evidence of criminal activity in an automobile located in a public place based on probable cause, without obtaining a warrant. *See State v. Tompkins*, 144 Wis. 2d 116, 137-38, 423 N.W.2d 823 (1988). Probable cause to search exists when, under the totality of the circumstances, including the knowledge and experience of the officer conducting the search, sufficient facts exist to “excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.” *State v. Lefler*, 2013 WI App 22, ¶8, 346 Wis. 2d 220, 827 N.W.2d 650 (quoted source omitted).

¶9 At the time of the search at issue here, the police had probable cause to believe that controlled substances might be found in the van based on the observation of packets of what appeared to be cocaine on the roof of the vehicle. In addition, the police had probable cause to believe that a firearm might be located in the van based on the content of dispatches they had heard that linked the

two men involved in the accident with an incident involving a firearm earlier that evening. Thus, contrary to Winters' assertions, the search was not conducted merely incident to the driver's OWI arrest, and the police were not limited to searching for evidence related to the driver's intoxication.

¶10 When there is probable cause to believe that a vehicle contains contraband or evidence of criminal activity, the police may validly search any area of the vehicle in which the evidence might be found. *See id.*, ¶14. Winters provides no argument that it makes any difference whether the officers searched the pockets of the jacket before or after they removed the jacket from the vehicle. Since the jacket was located in the vehicle, and was capable of concealing either controlled substances or a firearm which the police had probable cause to believe might be found in the vehicle, we conclude that it was reasonable for the police to search the jacket after removing it from the vehicle. We therefore reverse the circuit court's order suppressing evidence seized from the pockets of the jacket, and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

