COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP164-CR **Cir. Ct. No. 2015CF1206**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KYLE L. PARKER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Reversed and cause remanded for further proceedings*.

Before Sherman, Blanchard, and Fitzpatrick, JJ.

¶1 PER CURIAM. The State appeals a circuit court order granting Kyle Parker's motion to suppress evidence obtained as a result of a search incident to arrest. The State argues that the circuit court erred when it determined that officers lacked probable cause to arrest Parker in the absence of physical evidence that Parker was committing a crime. Because we conclude that the totality of the circumstances was sufficient to establish probable cause that Parker was committing a crime, we reverse the circuit court's order of suppression and remand for further proceedings.

BACKGROUND

¶2 Following a tip from a confidential informant that Parker was selling cocaine, officers conducted a sting operation that resulted in Parker's arrest. The following facts found by the circuit court are significant to whether officers had probable cause to arrest Parker. A person who had recently been arrested agreed to act as a confidential informant. The confidential informant told officers that he had purchased cocaine at various locations on the west side of Madison from a dealer named "Stunna," and that Stunna always showed up with cocaine available for purchase. The informant stated that Stunna drove a maroon Dodge Ram. Police records showed that Parker was associated with a maroon Dodge. The informant said that Stunna's first name was Kyle and described him as heavyset, black, and 5'10" or 5'11." Parker is 5'11" and matches this general description. After seeing a photograph of Parker, the informant identified him as Stunna.

¶3 While still in police custody, the informant telephoned the dealer (who the officers believed to be Parker) and asked to meet at a mall food court so that the informant could purchase an ounce of cocaine for $1400. Officers set up surveillance at the food court but did not see Parker. The dealer called the

informant, stating that he was at the food court and asked where the informant was. The dealer then switched the location for the purchase to an identified gas station. Officers set up surveillance at the gas station and observed a Chevy Malibu suspiciously circling the parking lot of the station. The dealer then texted the informant to meet at an identified bowling alley. Officers followed the Malibu from the gas station to the bowling alley. Officers ran the plates on the Malibu but did not identify any association with Parker. The dealer then changed the transaction location to a pizza place located in a strip mall. Officers followed the Malibu as it left the bowling alley and drove to the back of the parking lot for the strip mall. Along the way, an officer identified Parker as the driver of the Malibu.

¶4 Officers conducted a stop of the Malibu in the strip mall parking lot around the corner from the pizza place. Parker was removed from the vehicle, handcuffed, and frisked for weapons. Officers did not find anything on Parker's person at that time. A K-9 officer conducted a dog sniff of the Malibu, which produced a positive alert when the dog focused on the driver's seat. Officers arrested Parker and conducted a search of Parker incident to his arrest. Meanwhile, officers searched the Malibu.

¶5 The officers found nothing of interest in the car but did find heroin and cash in Parker's pockets, as well as cocaine in his rectum. Parker moved to suppress this evidence, arguing that the officers lacked probable cause to arrest him. The circuit court drew three conclusions from the historical facts. First, the officers had reasonable suspicion to stop defendant based on the information from the informant coupled with Parker's appearance at three of the four designated transaction locations. Second, the dog's positive alerts gave the officers probable cause to search the Malibu. Third, because the officers had not found any physical evidence of a crime, such as a controlled substance, at the time of the arrest,

therefore they lacked probable cause to arrest Parker. For this reason, the court ordered that all evidence obtained as a consequence of Parker's arrest be suppressed. The State appeals.

DISCUSSION

¶6 Whether officers had probable cause to arrest Parker is a question of constitutional fact. *See* ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). As such, it presents a mixed question of law and fact that involves a two-step standard of review. *See* ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We first review the circuit court's findings of historical fact for clear error. ***Id.*** We then independently review the application of those facts to constitutional principles. ***Id.***

¶7 In its decision granting Parker's motion to suppress, the circuit court made fifty-five findings of historical fact. The State does not argue that any of these factual findings are clearly erroneous. Instead, it focuses on the second step for our review, arguing that the facts found by the circuit court are sufficient to satisfy the constitutional standard of probable cause to arrest.

¶8 Before we move to this second step, however, we pause to note and reject Parker's argument that the State has taken facts out of context or intentionally misstated them. For example, he contends that the State's argument rests on the faulty premise that Parker agreed to sell the confidential informant cocaine during calls monitored by officers, because the word "cocaine" was never used. Parker also appears to question whether these contacts even occurred. Such arguments disregard our standard of review for the circuit court's findings of historical fact, which include detailed findings regarding the many contacts between the informant and Parker, as well as a finding that Parker had agreed to

sell cocaine, based on the slang used in these calls. *See* ***Post***, 301 Wis. 2d 1, ¶8 (we review the circuit court's findings of historical facts for clear error). At no point does Parker argue that the circuit court clearly erred in its fifty-five factual findings. We therefore move to the second step of applying the constitutional standard for probable cause to the historical facts found by the circuit court. *See* ***id.***

¶9 We conclude that one argument for reversal made by the State is correct and is dispositive. Specifically, we agree with the State's argument that the totality of the circumstances, up to and including the positive dog alert, established probable cause that Parker was engaging in a crime. The State contends that in addition to the positive dog alert, the following circumstances support probable cause: (1) the informant told police that Parker had previously sold drugs to the informant; (2) officers monitored phone calls that confirmed the relationship between Parker and the informant, and that Parker was willing to sell him drugs again; and (3) officers observed Parker at three of four locations where the drug buy was scheduled to take place. We agree with the State that these factors, together with the positive dog alert, are sufficient to establish probable cause to arrest Parker. Probable cause to arrest exists when the quantum of evidence within officers' knowledge at the time of the arrest would lead a reasonable officer to believe that Parker was probably committing a crime. *See* ***Secrist***, 224 Wis. 2d at 212. Here, the quantum of evidence plainly would lead a reasonable officer to believe that Parker was committing a crime.

¶10 Parker argues, consistently with the circuit court's approach, that officers should not have arrested Parker and instead should have left the scene once they failed to find contraband when searching the Malibu. But he offers no authority for such a proposition. We agree with the State that imposing a bright

line rule requiring physical evidence prior to an arrest is patently inconsistent with the notion that probable cause is a flexible, common sense standard that depends on the facts and circumstances of each case. *See* ***Secrist***, 224 Wis. 2d at 215.

¶11 We understand Parker to be making five additional arguments for why officers did not have probable cause to arrest, which we now address. First, he argues that officers had insufficient information to support a belief that the informant was reliable. However, we agree with the State that the officers took adequate steps to corroborate the information provided by the informant. *See* ***Illinois v. Gates***, 462 U.S. 213 (1983). In ***Gates***, police received an anonymous letter stating that the defendant was engaging in drug activity. ***Id.*** at 225. Police investigated the tip and confirmed Gates' identity as well as the accuracy of predictive details about a trip Gates was planning. ***Id.*** at 225-27. When Gates returned from the trip predicted by the anonymous tipster, police searched his car, finding marijuana. ***Id.*** at 227. The Illinois Supreme Court concluded that the anonymous tip could not be the basis for probable cause because officers had no way to gauge the tipster's reliability. ***Id.*** at 228-30. However, the U.S. Supreme Court rejected this bright line rule, concluding that the corroboration of certain details contained in the tip was sufficient to establish probable cause to conduct the search. ***Id.*** at 241-46.

¶12 Here, the State argues that officers took similar steps to corroborate the informant's tip. The State further contends that, unlike the anonymous letter writer in ***Gates***, the fact that the informant in this case was not anonymous to police further weighs in favor of reliability. We agree that the officers' efforts to confirm that Parker was the subject of the informant's tip, coupled with their observation of Parker at three of the four designated locations for the drug buy, was sufficient to corroborate the information from an informant who was in police

custody and cooperating with police. We therefore reject Parker's argument that the information received from the informant cannot be considered as part of the probable cause analysis.

¶13 Second, Parker makes much of the fact that the informant told officers that Stunna drove a maroon Dodge whereas the vehicle that Parker was driving when arrested was a Chevy Malibu. We are not sure what role this discrepancy plays in Parker's argument. To the extent Parker is arguing that this discrepancy undermined the informant's reliability, we disagree. Officers confirmed that Parker was associated with a maroon Dodge, as reported by the informant, and this helped corroborate the informant even though Parker was not driving the vehicle on the day in question. There is nothing in the record to suggest that the choice of a maroon Dodge was central to Parker's drug dealing activity, and there are any number of reasons, consistent with guilt, why Parker might have been driving a different vehicle on this particular day. To the extent Parker is suggesting that anyone familiar with him would know that he would be driving a Malibu, we also disagree. To the contrary, officers were not able to determine any association between the plates on the Malibu and Parker. At any rate, the discrepancy became insignificant once officers observed the Malibu at three of the four designated locations for the drug buy and confirmed that Parker was the person driving it.

¶14 Third, Parker points out that police did not witness any meeting between Parker and the informant on the date in question. We are not sure how this fact helps Parker, because the informant was not waiting for Parker in any of these locations and instead was in police custody, cooperating with police. Perhaps Parker is suggesting that it could have been only coincidence that his observed driving patterns on this particular day corresponded precisely to the three

communications relocating the drug buy. If that is his argument, we reject it. It is not a reasonable inference that Parker just happened to be repeatedly circling a gas station and then stopping briefly by a bowling alley, before heading to a strip mall parking lot behind a pizza place at the very time that a drug buy was scheduled to occur at each location. Moreover, even if such an inference were reasonable, when faced with competing reasonable inferences, an officer can rely on the inference that justifies an arrest. *See* ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. As discussed above, the fact that Parker was observed at three of four locations where a drug buy was scheduled to take place makes it reasonable to infer that Parker was there to sell the informant drugs.

¶15 Fourth, Parker argues that drug dogs are insufficiently reliable in detecting drugs. He points to data and other scientific evidence suggesting that drug dogs have a relatively low success rate (32%) that may depend on conditions other than the presence of contraband. We need not address the merits of this argument because the dog's positive alert is only one factor in our probable cause analysis. Parker does not argue that the dog's alert was completely meaningless, and instead agrees with the circuit court's conclusion that the dog's alert gave rise to probable cause to search the Malibu. We therefore see no reason not to consider the dog's positive alert as part of the totality of the circumstances giving rise to probable cause to arrest.

¶16 Finally, Parker contends that competing inferences could be drawn from the intercepted communications in this case, some of which support the conclusion that Parker was not in fact planning to sell drugs to the informant. For example, the fact that Parker repeatedly changed the location for the drug buy could indicate that he was planning to steal the informant's money, or perhaps that he suspected that the informant was trying to set him up. This argument does not

help Parker because, when faced with competing reasonable inferences, an officer is not required to draw the inference that favors innocence. *See* ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.[1] Parker does not argue that it was unreasonable to infer that Parker's observed presence at three of four designated locations for a drug buy meant that he intended to engage in a drug deal with the informant that day. Thus, officers were entitled to rely on the reasonable inference that justified the arrest. *See* ***Kutz***, 267 Wis. 2d 531, ¶12.

¶17 For these reasons, we reject Parker's argument that the officers lacked probable cause to arrest him. Our inquiry about whether the circuit court erred in granted the motion to suppress does not end here, however. The final question in determining whether the drugs and money found on Parker should be suppressed is whether they were discovered as part of a lawful search. The State argues that, because the officers had probable cause to arrest Parker, this was a lawful search incident to arrest. Parker does not make any counter argument. We therefore take the State's argument as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

[1] We also question whether the hypothetical explanations argued by Parker are reasonable inferences that favor innocence. The possibility that Parker may have planned to rob the informant still means that Parker was in the act of committing or attempting to commit a crime when he was arrested. As for the possibility that Parker's repeated changes to the location reflected suspicion that he was being set up, such elusive behavior would only bolster the inference that Parker was in the act of committing or attempting to commit a crime. Parker argues that the better inference is that he was merely pretending to be planning a drug sale to the informant by sending him to multiple locations. However, we do not agree that this is a reasonable inference.

CONCLUSION

¶18 For the foregoing reasons, we reverse the circuit court order granting Parker's motion to suppress and remand the case 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. (2015-16).