Appeal No. 2006AP1744-CR **Cir. Ct. No. 2004CF31**

WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN A. DENK,

DEFENDANT-APPELLANT.

FILED

JAN 31, 2008

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

We certify the following question: whether the police may search the personal belongings of a passenger that are found outside a motor vehicle incident to the arrest of the driver based on the reasoning of ***State v. Pallone***, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568.

The facts are undisputed. Jordan Denk was a passenger in a car driven by Christopher Pickering. A police officer approached the car, which was parked on the side of the road, to ascertain whether the driver was having problems with the vehicle. After determining that Pickering was not having car troubles, the officer noticed that the car's license plate was expired. The officer ran a check on his computer, which showed that the license plate was registered to a different vehicle. The officer approached the car again, this time detecting the smell of marijuana. At the police officer's instruction, both Pickering and Denk

exited the car. The officer searched Pickering and found drug paraphernalia. Pickering admitted that he was also in possession of marijuana. After placing Pickering under arrest, the officer walked around to the passenger side of the vehicle and noticed an eyeglass case lying on the gravel, right outside the passenger's door.[1] The officer asked Denk if the eyeglass case was his and he replied that it was. The officer asked Denk to retrieve the eyeglass case. Denk picked it up and placed it on the hood of the car. The officer searched the case, finding drug paraphernalia. The officer then placed Denk under arrest and searched his person, finding drugs.

Denk moved to suppress evidence against him, arguing that his rights under the Fourth Amendment were violated when the police officer searched his eyeglass case. The circuit court denied the motion.

The State contends that the search of Denk's eyeglass case was constitutional as incident to Pickering's arrest under ***Pallone***. In ***Pallone***, 236 Wis. 2d 162, ¶¶54-55, the supreme court held that the police search of a passenger's closed duffel bag inside a car was legal under the search-incident-to-arrest exception to the warrant requirement when the driver had been placed under arrest. The ***Pallone*** court explained that personal belongings of a passenger located in a motor vehicle are subject to search based on safety concerns for the police and the need to preserve evidence. ***Id.***, ¶¶47, 50.

[1] There was no testimony at the suppression hearing about how the eyeglass case got on the ground and the circuit court made no findings of fact pertaining to how the eyeglass case came to be in this location.

The State contends that the search was permissible under ***Pallone*** because Denk was standing within easy reach of the eyeglass case when it was on the ground, thus raising concerns for the officer's safety and the potential destruction of evidence. The State argues that the scope of a search incident to arrest should not be limited to an arbitrarily circumscribed area inside the vehicle but, instead, the scope of the permissible search should be measured under the "flexible concept of immediate area." The State argues that this will prevent the person arrested from grabbing a weapon or destroying evidence that may be located outside the car. The State contends that its argument is also based on common sense because "no court has ever held, or would ever hold, that occupants of a vehicle can defeat the search incident to arrest exception by surreptitiously tossing their contraband on the ground outside the car …."

Denk contends that the State's argument calls for an unprecedented extension of ***New York v. Belton***, 453 U.S. 454 (1981), which allows police to search the passenger compartment of a car incident to the arrest of an occupant of the car. Denk contends that no Wisconsin case has ever extended ***Belton*** to include the belongings of a passenger who has not been arrested that are located outside the car. Denk notes that the supreme court in ***Pallone*** carefully framed the issue before it as whether a driver's arrest justified "a warrantless search of the passenger compartment and *any containers, open or closed, located in that compartment*." ***Pallone***, 236 Wis. 2d 162, ¶42 (emphasis added). Denk contends that ***Pallone*** allows a search of only those items located inside a vehicle.

United States Supreme Court precedent teaches that, while a passenger's belongings in a car may be searched incident to the arrest of an occupant of the car because they may conceal evidence of the arrestee's crime, probable cause to search a car does not justify a body search of a passenger.

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). If the eyeglass case had been found in the car, it would have been constitutionally permissible to search it. *See* ***Pallone***, 236 Wis. 2d 162, ¶¶54-55; ***Houghton***, 526 U.S. at 303. Conversely, if the eyeglass case had been in Denk's pocket or otherwise on his person, the police would not have been permitted to open it or search it incident to Pickering's arrest. *See* ***Houghton***, 526 U.S. at 303.

The question thus presents itself: what inquiry should be made when a passenger's personal belongings are found outside a motor vehicle? Must the circuit court make a factual finding as to how the passenger's property ended up outside the vehicle? May the police officer draw an inference that Denk tossed the case from the car or that it fell out of the car, and was thus subject to search? Should the police officer draw an inference that the case fell out of Denk's pocket, and thus was not subject to search? Because the State carries the burden, does the State's failure to show how the eyeglass case got out of the car require an inference that it was on Denk's person and then fell to the ground, thus resulting in suppression of the evidence?

Pursuant to WIS. STAT. RULE 809.61 (2005-06), we certify the appeal in this case to the Wisconsin Supreme Court for its review and determination.[2]

[2] Denk raises a second issue that can be resolved under existing law, so we do not address that question in this certification.