COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 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. 2014AP1787-CR **Cir. Ct. No. 2014CM99**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MIRANDA K. HINDERMAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] The State of Wisconsin appeals an order from the Grant County circuit court suppressing evidence of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

tetrahydrocannabinols (marijuana) and drug paraphernalia confiscated by law enforcement officers from the vehicle of Miranda K. Hinderman following a traffic stop and subsequent arrest for operating a motor vehicle while intoxicated (OWI). On appeal, the State argues that the court erred in suppressing the evidence because under ***Arizona v. Gant***, 556 U.S. 332 (2009), a law enforcement officer may search containers in a vehicle for evidence of intoxicants or other substances that could impair driving after a lawful arrest for OWI. Hinderman responds that, in this case, the circuit court correctly concluded that officers must have a reasonable belief that evidence relating to the crime of arrest could be found in the vehicle, and specifically, inside a three-by-three inch pouch located inside Hinderman's purse, and that here, no reasonable belief existed. We conclude that, under the particular circumstances of this case, the search of the pouch within Hinderman's purse was not reasonable because the officer did not have sufficient articulable facts to form a reasonable belief that evidence of the crime for which Hinderman was arrested, OWI, was inside the unopened pouch. Accordingly, we affirm.

BACKGROUND

¶2 The following facts are taken from the criminal complaint and the suppression hearing before the circuit court. In March 2014, Deputy Jerry Vesperman observed a silver vehicle cross the center lane three times while driving north on Highway 80 in Grant County. The deputy conducted a traffic stop and observed a female, Miranda K. Hinderman, in the driver's seat. While speaking to Hinderman, the deputy smelled a strong odor of intoxicants coming from within the vehicle. The deputy described Hinderman's eyes as bloodshot and glassy. When asked how many drinks Hinderman had consumed that night, she responded, "just a couple."

¶3 The deputy asked Hinderman to perform field sobriety tests. Based upon Hinderman's performance of the sobriety tests, the odor of intoxicants, Hinderman's slurred speech, glossy eyes, and admission to drinking, the deputy placed Hinderman under arrest for OWI, second offense. After being told that she was under arrest, Hinderman was handcuffed and placed in the back seat of the squad car. Deputy Vesperman stated that he asked Hinderman whether she wanted her keys and cell phone from her vehicle, and she responded yes. He also asked Hinderman if she wanted her purse, which was sitting on the passenger seat of the motor vehicle. Hinderman was equivocal in answering no, but responded that she wanted her cell phone, keys, and her car locked up.

¶4 While Deputy Vesperman was talking with Hinderman about her purse, a second deputy went to Hinderman's car and began to search the vehicle.[2] Vesperman eventually joined the second deputy and they searched the vehicle together. At the time, neither of the deputies observed any alcohol containers in plain view. While searching Hinderman's car, the second deputy found a purse, which was eventually identified as belonging to Hinderman, looked inside the purse and found a closed, red zippered pouch, approximately three-by-three inches in length and one-half inch to three quarters of an inch wide. The deputy opened the pouch, where he found a metal one hitter smoking device, a small wooden box, and a clear plastic bag containing marijuana.

¶5 Subsequently, Hinderman was charged with OWI, second offense, operating with a prohibited alcohol concentration, second offense, possession of

[2] Initially, whether Hinderman consented to the search of her vehicle was contested. However, the State does not raise that issue on appeal. Thus, we assume for purposes of this appeal that Hinderman did not give consent to the deputies to search her vehicle.

marijuana, and possession of drug paraphernalia. Hinderman filed a motion to suppress the marijuana and paraphernalia, on the ground that the warrantless search of her motor vehicle and the red pouch found in her purse inside the vehicle in particular, violated her right to be free from unreasonable searches and seizures secured by the Fourth Amendment of the United States Constitution and Wis. Const. art. 1, § 11, under the rule expressed in ***Gant***, pertaining to warrantless searches of motor vehicles pursuant to a lawful arrest.

¶6 A hearing was held on Hinderman's motion, and the circuit court granted Hinderman's motion to suppress the marijuana and paraphernalia. The State appeals the suppression order.

DISCUSSION

¶7 Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. ***State v. Wantland***, 2014 WI 58, ¶18, 355 Wis. 2d 135, 848 N.W.2d 810. "When presented with a question of constitutional fact, this court engages in a two-step inquiry. First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principals to those facts." ***Id.***, ¶19 (citations and quoted source omitted).

¶8 The State argues that ***Gant*** governs the outcome of this case. In ***Gant***, the United States Supreme Court held that law enforcement officers may search a motor vehicle without a warrant incident to a lawful arrest when: (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," *or* (2) "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" ***Gant***, 556 U.S. at 343

(quoting another source); *see also* ***State v. Dearborn***, 2010 WI 84, ¶26, 327 Wis. 2d 252, 786 N.W.2d 97. In this case, the parties agree that the first prong in ***Gant*** is inapplicable because there was no concern for officer safety. There is no dispute that Hinderman was under arrest and secure in the squad car at the time of the search. Thus, our analysis focuses on the second prong, namely, whether sufficient articulable facts existed at the time of Hinderman's arrest for the officers to reasonably believe that Hinderman's vehicle contained "evidence relevant to the crime of arrest," OWI. *See* ***Gant***, 556 U.S. at 343.

¶9 Applying the second prong in ***Gant***, the State contends that the deputies were justified in searching Hinderman's vehicle and any containers located therein for evidence that she was driving while under the influence of an intoxicant. As for searching Hinderman's purse, the State argues that the deputies were justified in looking inside Hinderman's purse and inside the three-by-three inch pouch after arresting Hinderman because the pouch was a container that could have held a small, single-serving container of alcohol.[3] In response, Hinderman argues that the State did not present specific articulable facts providing a reason to believe that Hinderman's vehicle, or the pouch, may contain evidence of the OWI arrest. We agree.

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[3] The State also argues in the alternative that the pouch found in Hinderman's purse was large enough to hold marijuana, and that because the OWI statute prohibits operating a motor vehicle while under the influence of alcohol *and controlled substances*, it was reasonable for the deputies to search Hinderman's purse and the pouch for controlled substances as well as for alcohol. We note that the State did not make this argument in the circuit court. Because the State raises this argument for the first time on appeal, the State forfeits this argument and we therefore decline to consider it. ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (arguments are forfeited on appeal if not first raised in the circuit court).

¶10 After hearing testimony from Deputy Vesperman and arguments from both parties, the circuit court gave a thoughtful and well-reasoned explanation in support of its decision to grant the motion to suppress the marijuana and drug paraphernalia found in the pouch located inside Hinderman's purse:

> I'm persuaded by the observation in ***Gant*** itself. That although motorists' privacy interests in a vehicle is less substantial, it's nonetheless important and deserving of constitutional protection. That the concern in the Fourth Amendment is about giving unbridled discretion to rummage at will among a person's privacy effects.
>
> That is particularly true when we're dealing with a three[-]by[-]three container, in a purse, in a vehicle, that is secure, that really is tangentially likely, if at all, to contain evidence of an OWI arrest. If the search incident to an OWI arrest was to poke your head around and see if there's a cup sitting in the console, or bottles on the floor, or some obvious sign of alcohol in the immediate possession of the driver at the time of driving, that is the kind of search where there is a reasonable likelihood of discovering some evidence of the offense of arrest.
>
> But to say that it extends to going in a purse, and then going in a three[-]by[-]three by half or three[-]quarter inch container within that purse, when it's an OWI arrest. That wouldn't hold a half pint of alcohol, it wouldn't hold a can of beer, it wouldn't hold the flask[-]type things that can be used to carry alcohol—it may, as Attorney Riniker asked on examination, contain one of those little one[-]shot bottles of alcohol. But that is simply too remote to be specific and articulable in the scheme.

The court concluded its oral ruling by saying that "there has to be some scintilla of something beyond merely it being an OWI arrest to justify a search of this extent of the personal belongings of the occupant of the vehicle."

¶11 The circuit court concluded that under these facts and circumstances, specific and articulable facts did not exist to base a reasonable belief that evidence relating to the crime of OWI would be found in the three-by-three inch pouch

inside Hinderman's purse. We agree with the court's reasoned and thoughtful analysis, and adopt it as our own.

¶12 As noted above, we review the circuit court's findings of fact under the "clearly erroneous" standard. *See* ***Wantland***, 355 Wis. 2d 135, ¶19. The State does not argue that any of the court's factual findings were clearly erroneous. The State's challenge to the court's order granting Hinderman's motion to suppress evidence hinges entirely on its contention that given the size of Hinderman's pouch, it was reasonable for the deputy to believe that evidence of the OWI, such as a small, one-shot bottle of alcohol commonly served on passenger jets, would be found. However, the State ignores the court's finding that it was "simply too remote" that "one of those little one[-]shot bottles of alcohol" would be stored in the pouch. We give great deference to a circuit court's factual findings and the State provides no reason for us to deviate from this standard here. Once we take this argument away from the State, the State has no other basis to argue that the search of Hinderman's purse and her pouch was reasonable under ***Gant***.

¶13 We would be remiss if we did not acknowledge an underlying argument the State makes here, which echoes a discussion that is taking place in courts throughout the country. Particularly, the ***Gant*** court left open the possibility that "the offense of arrest will supply a [per se] basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." ***Gant***, 556 U.S. at 344. The State argues in this case that the offense of OWI qualifies as the type of case discussed in ***Gant*** that supplies a per se basis for searching a vehicle and its containers without a warrant pursuant to an arrest for evidence of operating while under the influence of an intoxicant. The circuit court in this case chose not to examine that question, and we choose not to do so as well. Frankly, it is not necessary for us to address this highly charged issue here because

of the narrow basis upon which the circuit court grounded its conclusion that the warrantless search of Hinderman's vehicle was unconstitutional, which the State has failed to provide a reason to upset. As the Supreme Court did in ***Gant***, we wait for another day to take up this issue.

¶14 Based on the foregoing reasons, we affirm the circuit court's order granting Hinderman's motion to suppress evidence.

By the Court.—Order affirmed.

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