COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1446-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYNN H. MICKLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

¶1 SNYDER, J. Lynn H. Mickle appeals from a conviction of carrying a concealed weapon contrary to § 941.23, STATS., and from an order denying his motion to suppress evidence. Mickle contends that his van was illegally searched after he was lawfully taken into custody on an existing arrest warrant. We conclude that the search of Mickle's van incident to his arrest did not violate his

constitutional rights and affirm the order denying his suppression motion. We also affirm the judgment of conviction.

¶2 The relevant facts are undisputed. On the morning of April 17, 1997, Waukesha county sheriff deputies stopped Mickle's van and executed an existing warrant for Mickle's arrest issued by the town of Summit. Mickle was asked to exit his van and was taken into custody, searched, handcuffed and placed in the rear of a squad car. After Mickle's custodial arrest, a dog was removed from his vehicle, and approximately twenty minutes later,[1] Deputy Sheriff Richard Bach searched the van. Bach found a concealed weapon that he described as a "blackjack, a sap or a slapper" in a dashboard shelf. During Bach's vehicle search, Mickle remained in custody, seated in the rear seat of a squad car parked behind his van.

¶3 Mickle's appeal does not contest the legality of the arrest warrant, the stop of his van or his custodial arrest prior to the van search. He contends that because "he was secured in a police vehicle at the time of the search of his motor vehicle," Bach's entry into his van was not a valid search incident to arrest and must therefore be suppressed.

¶4 "In reviewing an order suppressing evidence, this court will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Guzy***, 139 Wis.2d 663, 671, 407 N.W.2d 548, 552 (1987). However, we review questions of constitutional fact, such as whether the interior of an automobile is an area that may be searched incident to a

[1] Mickle gave the deputies the name of the dog's owner, and after the police called her, she arrived to remove the dog. All of this took approximately twenty minutes.

custodial arrest, independently of the trial court. *See* ***State v. Fry***, 131 Wis.2d 153, 171, 388 N.W.2d 565, 573 (1986).

¶5 The United States and Wisconsin Constitutions require that the police obtain a warrant based upon probable cause before they conduct a search.[2] However, the warrant requirement is subject to several long-standing and well-established exceptions applicable to automobile searches. *See* ***Carroll v. United States***, 267 U.S. 132 (1925) (police may conduct a search of an automobile in their custody without a warrant); ***Texas v. Brown***, 460 U.S. 730 (1983) (police may search suspicious items in plain view within an automobile). Two primary considerations are recognized in sanctioning warrantless searches of motor vehicles: the inherent mobility of vehicles and a decreased expectation of privacy. *See* ***State v. Goebel***, 103 Wis.2d 203, 218-19, 307 N.W.2d 915, 922 (1981).

¶6 In ***Chimel v. California***, 395 U.S. 752 (1969), a further exception was recognized concerning searches incident to lawful arrests. The area "within ... [the] immediate control" of a person lawfully placed under arrest may be searched incident to that arrest in order to prevent the destruction of incriminating evidence and protect arresting officers from the arrestee's access to, and use of, concealed weapons to effect an escape. *See* ***id.*** at 762-63. In ***New York v. Belton***, 453 U.S. 454 (1981), the United States Supreme Court clarified the ***Chimel*** search authorization by stating, "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Belton***, 453 U.S. at 460 (footnotes omitted). ***Belton*** assumes that the interior of an

[2] *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.

automobile, including any containers therein, is within the arrestee's immediate control even when the arrestee is removed and separated from the car.

¶7 In ***State v. Fry***, 131 Wis.2d 153, 388 N.W.2d 565 (1986), the defendant was arrested for trespassing, handcuffed and secured in a squad car during a warrantless search of his automobile. The police found a gun in a locked glove compartment of the car. Our supreme court held that the search was a legal search incident to arrest and that the gun found in the locked glove compartment was admissible evidence. The court adopted the ***Belton*** rule:

> [W]e conclude that ***Belton*** is a reasonable application of the search incident to arrest exception to the warrant requirement.
>
> By adopting the ***Belton*** rule, Wisconsin police officers can follow the fourth amendment's mandates without worrying about whether some different restrictions might be imposed on them under the Wisconsin Constitution.

Fry, 131 Wis.2d at 175, 388 N.W.2d at 575. The court noted that it would not permit searches on a "case-by-case basis when the police believe that a suspect may escape from their control and regain access to an automobile. This [approach] is unworkable ... because such momentary escapes are not predictable." ***Id.*** at 175, 388 N.W.2d at 574.

¶8 In ***State v. Murdock***, 155 Wis.2d 217, 231, 455 N.W.2d 618, 624 (1990), the supreme court confirmed its holding in ***Fry***, ruling that "actual accessibility [to a weapon or evidence] ... cannot be the benchmark determining the authority to search and the reasonableness of the scope of a search incident to arrest."[3] ***Murdock*** affirmed that although the possibility that a defendant could

[3] Murdock was handcuffed and lying face down on the floor guarded by armed police while the police searched the house incident to his arrest and found an illegal weapon in a different room.

regain access to his or her respective vehicle was "slight," such remoteness did not invalidate the search incident to the defendant's arrest. *See* ***Murdock***, 155 Wis.2d at 233, 455 N.W.2d at 625. "[T]he ***Fry*** court drew from ***Belton*** the rule that the authority to search is not eviscerated and the area to be searched is not otherwise constricted because the arrestee is unlikely at the time of the arrest to actually reach into the area." ***Murdock***, 155 Wis.2d at 232, 455 N.W.2d at 624.

¶9 In applying ***Belton***, ***Fry*** and ***Murdock*** to the present circumstances, we need not make an assessment of the likelihood that Mickle would have seized a weapon from his vehicle. Accessibility of a weapon is not the benchmark determining the authority to search and the reasonableness of the scope of a search incident to arrest. Because the courts have rejected a case-by-case analysis in favor of a bright-line rule, a search of a vehicle after the arrestee is removed from it, handcuffed and placed in a squad car is permitted. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1(c), at 448-49 (3d ed. 1996) ("[U]nder ***Belton*** a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car, or even if a single defendant was in the custody of several officers."). Thus, we conclude that the warrantless search of Mickle's van contemporaneous with his lawful custodial arrest was not unreasonable even where it was physically impossible for him to regain access to the interior of the vehicle during the search.

¶10 Mickle contends that ***Knowles v. Iowa***, 525 U.S. 113, 119 S. Ct. 484 (1998), is applicable, arguing that the search of his van was illegal because there was no reason for the search after he was taken into physical custody. We disagree. In ***Knowles***, the United States Supreme Court held that the police could not search a motor vehicle incident to the issuance of a traffic ticket that did not involve a custodial arrest. *See* ***id.*** at ___, 119 S. Ct. at 488. Here, the premise of

the stop of Mickle's van was a valid arrest warrant, and Mickle was under custodial arrest. Therefore, this is not a ***Knowles*** case.[4]

By the Court.—Judgment and order affirmed.

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

[4] Mickle also cites to ***State v. Richter***, 224 Wis.2d 814, 592 N.W.2d 310 (Ct. App. 1999), in support of his contention that the search of his van was constitutionally unreasonable. ***Richter*** involved the suppression of evidence, obtained during a warrantless entry into a trailer, that was not sufficiently attenuated from an illegal entry. Mickle does not explain the relationship of ***Richter*** to his search and we cannot discern one.