COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP677-CR **Cir. Ct. No. 2008CF211**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS D. MCCLAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. In this traffic-stop case, Travis D. McClain appeals from a judgment entered upon his no-contest pleas to possession with intent to deliver cocaine and resisting an officer. We disagree with McClain that the police

officer exceeded the permissible scope of the stop and that the trial court improperly denied his suppression motion. We affirm.

¶2 City of Racine police officer Ted Batwinski testified that he stopped McClain's vehicle because of a malfunctioning brake light. McClain said he was aware of it but had not had time to fix it. McClain appeared "real fidgety and nervous" and Batwinski had to remind McClain "a number of times" to keep his hands on the steering wheel because he kept moving them toward his right pants pocket. When Batwinski "ran" McClain on the Mobile Data Center in his squad car, he learned that McClain was on probation for a drug offense. He reapproached McClain's vehicle and advised McClain he was going to issue him a citation for the defective lamp.

¶3 Batwinski then asked McClain to exit the vehicle so as to show him which of the brake lamp's two components was out. No backup officer had yet arrived. Batwinski asked if he first could do a weapons pat-down. McClain consented. A hard object in McClain's coat pocket proved to be a roll of quarters. With McClain's further consent, Batwinski continued the weapons pat-down, detecting what in his experience felt like a baggie of crack cocaine in McClain's right pants pocket. When Batwinski asked if it was crack, McClain fled. He eventually was apprehended, subdued and taken into custody. Batwinski found a gram scale and baggie of crack cocaine where McClain had been on the ground.

¶4 McClain filed a motion to suppress, challenging the search that led to the discovery of the cocaine.[1] The trial court observed that the cocaine was

[1] McClain's written motion to suppress also challenged the legality of the stop, but he abandoned that claim at the suppression hearing.

found pursuant to the arrest, not the pat-down. It concluded that requesting McClain to exit his vehicle to show him the violation was "an appropriate part of the traffic stop," and denied the motion. McClain appeals.

¶5 When reviewing a trial court's denial of a motion to suppress, we first examine the court's findings of historical fact under the clearly erroneous standard, and then review de novo the application of constitutional principles to those facts. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Whether police conduct violates the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72.

¶6 A traffic stop constitutes a seizure. ***State v. Arias***, 2008 WI 84, ¶29, 311 Wis. 2d 358, 752 N.W.2d 748. McClain does not contend the initial stop was unjustified but that, despite twice consenting to the pat-down for weapons, it was transformed into an unreasonable seizure when Batwinski had him exit the vehicle. Consent given during an illegal seizure will not sustain a search. ***State v. Kolk***, 2006 WI App 261, ¶20, 298 Wis. 2d 99, 726 N.W.2d 337.

¶7 McClain argues that Batwinski had no further legal basis to detain him. He invokes ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104, where we held that detaining the defendant beyond the legal justification for the traffic stop invalidated the search. *See* ***id.***, ¶¶21-23. The State responds that ***Jones*** is distinguishable because there the initial stop had concluded and here the request to do a weapons pat-down was directly related to the purpose of, and thus simply extended, the initial stop.

¶8 When a stop is justified at its inception, it is the extension of a detention past the point reasonably justified by the initial stop, not the nature of

the questions asked, that violates the Fourth Amendment. ***State v. Gaulrapp***, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996). We use a three-part test to determine whether the duration of an investigative stop was unconstitutionally extended. *See* ***Arias***, 311 Wis. 2d 358, ¶¶33-34. We weigh (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. ***Id.***, ¶34. Our focus is the reasonableness of the extension and we review the totality of the circumstances to determine whether a reasonable seizure was transformed into an unreasonable one. ***Id.***

¶9 McClain asserted in his motion to suppress that a short in his brake light caused it to "come on and off continuously." Batwinski testified that he asked McClain to get out of the car to show him which of the light's components was not working. Having no backup, Batwinski asked to do a pat-down for weapons because McClain's "nervous" and "fidgety" demeanor, hand movements toward his right pocket and history of a drug offense caused Batwinski to look at the situation "more [from] an officer safety perspective."

¶10 McClain dismisses Batwinski's stated reason as a pretext to search. He argues that, if the officer truly had safety concerns, it was "rather odd" that he would prolong the encounter by having McClain get out to observe a defective tail light he already was aware of. The trial court, too, commented that to an extent Batwinski created his own potentially unsafe situation. Nonetheless, the court accepted Batwinski's judgment and found the pat-down permissible in view of all the circumstances, including McClain's express consent. Whether to give credence to the officer's testimony was a matter for the trial court. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 ("When the circuit court acts as the finder of fact, it is the ultimate

arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony.").

¶11 We conclude that Batwinski's request that McClain step out of the car was directly related to the purpose of the initial stop. His concomitant request to perform a pat-down furthered the valid public concern of protecting his personal safety. *See* ***Arias***, 311 Wis. 2d 358, ¶30. McClain's detention was not unreasonably prolonged by Batwinski's requests and the brief and minor interference with his personal liberty was not unreasonable. The totality of the circumstances persuades us that the initial stop and the pat-down were part of one fluid transaction. The search was not incident to a separate, illegal seizure.

By the Court.—Judgment affirmed.

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