COURT OF APPEALS DECISION DATED AND FILED

March 23, 2010

David R. Schanker
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. 2009AP1315-CR

Cir. Ct. No. 2006CF312

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFONZO JERMONT ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Alfonzo Allen appeals a judgment of conviction, entered upon his no contest plea, on one count of possession of more than one

gram but not more than five grams of cocaine with intent to distribute in violation of WIS. STAT. § 961.41(1m)(cm)1r.[1] He asserts police, acting pursuant to information obtained from a confidential informant, lacked probable cause to conduct a warrantless search of his automobile. We conclude the search of his vehicle was supported by probable cause and affirm.

BACKGROUND

¶2 Around 2 p.m. on December 11, 2006, Nick Lukovsky, a Duluth, Minnesota police investigator, contacted Michelle Lear, a Superior, Wisconsin police officer. Lukovsky stated that earlier on December 11 he participated in a controlled buy during which an informant purchased cocaine from Allen. The informant told Lukovsky he observed a large amount of crack cocaine in Allen's vehicle. Lukovsky, who stopped Allen a few days earlier in Duluth, stated Allen drove a maroon GMC van and provided the license plate number. Lukovsky asked Lear to watch for Allen's van near the Manning Motel in Superior, where he suspected Allen was staying.

¶3 Lear parked her undercover vehicle near the Manning Motel. At approximately 2:30 p.m., a maroon GMC van passed the motel and stopped in the lot of a nearby liquor store. The van driver, a short black male wearing a red hooded sweatshirt, exited his vehicle and spoke with the driver of a parked car. Lear relayed the van driver's description to Lukovsky, who confirmed the driver matched Allen's appearance. Allen returned to his vehicle and left the parking lot.

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Allen parked in a nearby plaza parking lot for over an hour while Lear and other officers continued surveillance. Lukovsky, who by then had finished with his informant, arrived and identified Allen as the driver and suspected dealer. He also identified the van as the same vehicle from the controlled buy.

¶5 Allen made several brief stops after leaving the plaza. When he eventually parked outside the Manning Motel, Lear approached the van with two plain-clothes officers and identified the group as law enforcement. Through the driver's window, Lear could see Allen place his right hand between the driver and passenger seats. Concerned he might be reaching for a weapon, Lear ordered Allen out of the vehicle. As he exited the van, a marijuana pipe fell to the ground. Allen was handcuffed, and a pat-down search revealed approximately $1,590, mostly in $20 bills. Police searched the van and discovered approximately forty-nine grams of crack cocaine. Following the denial of his suppression motion, Allen pled no contest to the reduced charge of possession of between one and five grams of cocaine.

DISCUSSION

¶6 Allen challenges the admissibility of the evidence obtained from the warrantless search of his vehicle. We review a circuit court's decision to grant or deny a suppression motion using a two-tiered standard. This court applies a deferential standard to the circuit court's findings of historical fact, which we affirm unless clearly erroneous. ***State v. Pallone***, 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568. The application of constitutional principles to historical fact presents a question of law that we review independently. ***Id.***

¶7 Warrantless searches are per se unreasonable unless justified by one of a "few specifically established and well-delineated exceptions" to the warrant requirement. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998) (citing ***Coolidge v. New Hampshire***, 403 U.S. 443, 454-55 (1971)). One such exception permits the warrantless search of an automobile, including one stopped in a parking lot, if there is probable cause to believe the object of the search is within the vehicle.[2] ***Pallone***, 236 Wis. 2d 162, ¶58.

¶8 "Probable cause is a fluid concept, assuming different requirements depending upon its context." ***State v. Hughes***, 2000 WI 24, ¶19, 233 Wis. 2d 280, 607 N.W.2d 621. In the warrantless search context, probable cause is established if there is a fair probability that law enforcement authorities will find evidence in a particular place. ***Pallone***, 236 Wis. 2d 162, ¶74. We must assess the totality of the circumstances to determine whether there existed a fair probability evidence of crimes involving controlled substances would be found in Allen's van. *See* ***id.*** (citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)).

¶9 In determining whether there was a fair probability that Lear would discover evidence of controlled substance violations in Allen's van, our analysis is not limited to her personal observations made while tracking the van. An officer may rely on all collective knowledge within the police department; "[t]he police force is considered as a unit and where there is police-channel communication to the [searching] officer and he acts in good faith thereon, the arrest is based on

[2] Allen also argues the vehicle search cannot be justified as a search incident to arrest under ***Arizona v. Gant***, 129 S.Ct. 1710 (2009), which, unlike the automobile exception, requires a prior valid arrest. *See* ***State v. Pallone***, 2000 WI 77, ¶¶32, 36, 236 Wis. 2d 162, 613 N.W.2d 568; ***State v. Marten-Hoye***, 2008 WI App 19, ¶8, 307 Wis. 2d 671, 746 N.W.2d 498. Although Allen does not challenge the validity of his arrest, we decline to address that argument because we determine the search was permissible under the automobile exception.

probable cause when such facts exist within the police department." ***State v. Mabra***, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974); *see also* ***Schaffer v. State***, 75 Wis. 2d 673, 676, 250 N.W.2d 326 (1977), *overruled on other grounds by* ***State v. Walker***, 154 Wis. 2d 158, 185, 453 N.W.2d 127 (1990). Our probable cause assessment must therefore focus on whether the facts known to Lukovsky, coupled with Lear's observations, establish a fair probability that evidence of a crime involving controlled substances would be found in Allen's vehicle.[3]

¶10 We conclude the search was justified by the totality of the circumstances. Lukovsky's informant observed cocaine in Allen's vehicle and witnessed its sale. The informant, acting under police supervision, identified Allen as the individual from whom he made the purchase.[4] Lukovsky, whether possessing knowledge from his supervision of the controlled buy or recalling his stop of Allen mere days before, described Allen's vehicle and asked Lear to wait near the Manning Motel for the van. Approximately one-half hour after receiving this request, Lear observed both a vehicle and a driver matching those observed by Lukovsky and his informant during his drug investigation. The van was spotted in the precise location Lukovsky described. Lukovsky identified both the van and Allen from the earlier drug transaction. Even after confirming the description of the vehicle and identity of the driver, police did not act until Allen stopped at the Manning Motel.

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[3] Allen claims our recent decision in ***State v. Pickens***, 2010 WI App 5, ¶13 (Ct. App. 2009), precludes application of the collective knowledge doctrine because Lear relied on the "unspecified knowledge of another officer." We disagree. Lear testified extensively to the facts underlying Lukovsky's request, including his informant's controlled purchase of narcotics. Thus, this is not a case in which an officer acted in reliance upon a police communication without knowledge of the underlying facts. *See* ***United States v. Hensley***, 469 U.S. 221, 232 (1985).

[4] The circuit court found the informant's observations were "recent" and "fresh" when communicated to Lear.

¶11 Events following Allen's detention increased the likelihood that police would discover additional evidence of a crime involving controlled substances inside Allen's vehicle. At the time of the search, police knew Allen possessed drug paraphernalia—a marijuana pipe—and a large quantity of organized cash. Allen disputes neither the validity of his detention nor his arrest, events which preceded the automobile search and produced this incriminating evidence. The informant's perceptions, coupled with the evidence police discovered while acting upon them, collectively establish probable cause.

¶12 Allen argues information the informant provided cannot supply the factual basis for probable cause because the informant's reliability was not established. Probable cause "is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances ….'" ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Alabama v. White***, 496 U.S. 325, 330 (1990)). "[T]he fact that an informant is an eyewitness shows a basis for the informant's knowledge that makes it reasonable to believe in its accuracy." ***State v. Kolk***, 2006 WI App 261, ¶19, 298 Wis. 2d 99, 726 N.W.2d 337; *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3(d) at 152 (4th ed. 2004) ("the surest way to establish a basis of knowledge is by a showing that the informant is passing on what is to him first-hand information").

¶13 Here, the informant's statements demonstrated sufficient indicia of reliability. According to Lear's testimony, the informant personally observed a large amount of crack cocaine in Allen's vehicle while participating in the controlled purchase of narcotics. Although Lear did not testify as to how the controlled buy occurred, even a minimal amount of police supervision increases

the reliability of the informant's information. *See* LAFAVE, *supra*, § 3.3(f) at n.352 (less satisfying corroboration where no controlled purchase but informant supports his or her story by delivering purchased drugs to police). Although we lack sufficient information to assess the informant's credibility, "his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case." ***Gates***, 462 U.S. at 234. The circuit court properly denied Allen's suppression motion.

By the Court.—Judgment affirmed.

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