COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2660-CR **Cir. Ct. No. 2009CM68**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GORDON J. SCHLAPPER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded*.

¶1 PETERSON, J.[1] The State appeals an order granting Gordon Schlapper's motion to suppress evidence obtained when police searched his vehicle. The State argues the evidence should not have been suppressed because

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the search was (1) validly conducted as incident to the passenger's arrest, and (2) supported by probable cause. We agree. We therefore reverse and remand.

BACKGROUND

¶2 On March 14, 2009, trooper Derrek Hanson stopped Schlapper for speeding. When Hanson approached Schlapper's vehicle, he smelled intoxicants and saw an open container of alcohol on the center console, an open twelve-pack of beer on the floor, and the neck of what appeared to be a liquor bottle sticking out of the beer pack. When Hanson inquired about open intoxicants, Schlapper handed him the container from the center console, a can of Coors Light. The passenger in the front seat, David Marx, also handed him a glass of cola and liquor. As Hanson walked back to his squad he turned to watch Schlapper's vehicle and saw a plastic baggie thrown out of the passenger side window. He immediately returned to the vehicle and asked Marx if that was his "dope that just flew out the window." Marx said it was. Hanson retrieved the baggie, determined it was marijuana, placed Marx under arrest for possession of Tetrahydrocannabinols (THC), and placed him in the squad.

¶3 After determining Schlapper was not operating while intoxicated, Hanson searched the vehicle. During the search, he found a container of marijuana, a pipe, and an alligator clip, which he testified is commonly used to smoke marijuana. Hanson then placed Schlapper under arrest for possession of THC and drug paraphernalia.

¶4 Schlapper moved to suppress the evidence, arguing Hanson lacked probable cause to search his vehicle. The State opposed the motion, contending it was lawful (1) as a search incident to Marx's arrest, and (2) also because there was probable cause to search. The circuit court did not appear to address the State's

probable cause argument. Instead, purporting to rely on ***Arizona v. Gant*** 129 S. Ct. 1710 (2009), it held there was no valid search incident to arrest because the only person who had been arrested, Marx, was already secured when Hanson conducted the search. It therefore suppressed the evidence from the search. The State appeals.

DISCUSSION

¶5 The only issue on appeal is whether the evidence Hanson obtained after searching Schlapper's vehicle should be suppressed. When reviewing a circuit court's ruling whether to suppress evidence, we uphold the circuit court's findings of fact unless clearly erroneous. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. The application of those facts to constitutional principles, however, is a question of law we decide independently. ***Id.***

1. Search incident to arrest

¶6 The circuit court's ruling was based on its interpretation of ***Gant***, in which the United States Supreme Court discussed the circumstances in which police may search a vehicle incident to the arrest of one of its occupants. The issue in ***Gant*** was whether police could search a vehicle after arresting the defendant for operating without a license and securing him in the squad car. The Court held they could not because the considerations that permit a search incident to an arrest—officer safety and evidence preservation—were not implicated. ***Gant***, 129 S. Ct. at 1715-16. However, it observed police may search a vehicle incident to an arrest when these considerations are present and articulated two circumstances when this would be the case. The first is "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." ***Id.***, at 1719. The second is "when it is reasonable to believe

evidence relevant to the crime of arrest might be found in the vehicle." ***Id.*** (citation and internal punctuation omitted).

¶7 Here, the circuit court appeared to treat these two circumstances as a two-part conjunctive test, ending its inquiry after concluding Marx could not reach the passenger compartment because he "had been … secured by handcuffing … [and] placed in the officer's squad car." Accordingly, it failed to proceed to the second circumstance: when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

¶8 We conclude this second circumstance authorized Hanson to search Schlapper's car. Indeed, this is precisely the type of case ***Gant*** observed the circumstance would encompass. ***Gant*** illustrated this by reference to an earlier case, ***New York v. Belton***, 453 U.S. 454 (1981). In ***Belton***, the officer arrested the defendant after he "smelled burnt marijuana and observed an envelope on the car floor marked 'Supergold'—a name he associated with marijuana." ***Gant***, 129 S. Ct. at 1717 (discussing ***Belton***, 453 U.S. 454). The officer then searched the passenger compartment of the vehicle. ***Gant*** affirmed that in cases like these "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." ***Gant***, 129 S. Ct. at 1719. The same is true here. After Hanson arrested Marx for THC possession, it was reasonable to believe evidence relating to the arrest—that is, drug paraphernalia or more THC—would be found in the car.[2] Therefore, the search was lawful.

[2] Schlapper appears to contend ***Gant*** did not justify the search because Marx, not Schlapper, was the arrestee. ***Gant*** contains no requirement any particular occupant of the vehicle be the arrestee. Instead, it holds "[p]olice may search a vehicle incident to a *recent occupant's* arrest … if … it is reasonable to believe the vehicle contains evidence of the offense of arrest." ***Arizona v. Gant***, 129 S. Ct. 1710, 1723 (2009) (emphasis added).

2. Probable Cause

¶9 The circuit court did not address the State's argument that the search was also supported by probable cause, apparently because the court concluded ***Gant*** prohibited the search. However, ***Gant*** only addressed searches incident to arrest. Nothing in ***Gant*** precludes a vehicle search based on probable cause. Here, probable cause provided an additional and independent basis for Hanson to search Schlapper's vehicle.

¶10 Police may conduct a warrantless search of a vehicle if there is probable cause to believe it contains evidence of criminal activity. ***Gant***, 129 S. Ct. at 1721. Hanson observed Marx throw a baggie of marijuana—which Marx promptly admitted was "his dope"—out the car window. Hanson also observed multiple open containers of alcohol. Open containers of alcohol such as "beer receptacles … can be evidence of a crime," providing probable cause to search the vehicle. ***State v. Pallone***, 2000 WI 77, ¶¶75-77, 236 Wis. 2d 162, 613 N.W.2d 568. Hanson's observation of marijuana and open containers of alcohol in the vehicle amply established probable cause the vehicle contained additional open containers, drugs, or drug paraphernalia.[3]

By the Court.—Order reversed and cause remanded.

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

[3] Schlapper focuses on Hanson's statement he did not believe he had probable cause to search the vehicle. The officer's subjective belief is irrelevant. "In determining whether probable cause exists, the court applies an objective standard and is not bound by the officer's subjective assessment of motivation." ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660 (citation omitted).