COURT OF APPEALS
DECISION
DATED AND RELEASED

October 4, 1995

NOTICE

No. 95-1140-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WAYNE BUSHBERGER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Judgment affirmed in part and reversed in part with directions.*

BROWN, J. Wayne Bushberger appeals his convictions for obstructing an officer, possession of marijuana, and possession of drug paraphernalia. We reverse the trial court's ruling permitting the introduction of evidence of the contents of a locked briefcase taken by police from Bushberger's automobile as a search incident to the arrest. We affirm the conviction on the

charge of obstructing an officer because that charge did not emanate from the illegal search and because a reasonable jury could find that the elements of the charge were proven.

The facts are as follows. On March 25, 1993, Officer Murphy of the Muskego police department stopped Bushberger, whom he had observed speeding. Bushberger's speech was slurred, and Murphy detected an odor of intoxicants. A check revealed an outstanding warrant against Bushberger for unpaid fines and that Bushberger did not have a valid operator's license. Murphy decided to take Bushberger into custody and to conduct sobriety tests on Bushberger at the police station where there was a warmer and more controlled environment.

Bushberger was handcuffed and placed in the squad car. Murphy and Officer Simuncak, who had since arrived at the scene, then conducted a search of the automobile. The officers located a locked briefcase. Because one of the two locks was defective, Murphy was able to partially lift the lid and see bundles of paper. He decided to bring the briefcase to the station, over Bushberger's objections.

Testimony before the trial court regarding the opening of the briefcase at the station differed. The police maintained that Bushberger opened the briefcase and removed its contents upon request. Bushberger denied this, asserting that upon his refusal, Murphy pried the briefcase open with a screwdriver. Marijuana and drug paraphernalia were found inside the briefcase. When officers then attempted to administer a chemical breath test to

Bushberger, he refused, assumed a fighting posture, and made verbal threats. The resulting physical struggle led to the charge of obstructing an officer.

Prior to trial, Bushberger brought a motion seeking to suppress the evidence obtained from the search of the briefcase. He argued that because the search was conducted at the police station, and not at the scene of the arrest, the search could not be justified as incident to the arrest. The trial court denied the motion, finding the passage of time insignificant and expressing concern that a search of the briefcase at the arrest scene might create a risk of documents or other evidence blowing away in the wind. The jury convicted Bushberger on the charges of possession of marijuana, possession of drug paraphernalia, and obstructing an officer, but found him not guilty of operating a motor vehicle while under the influence of intoxicants.

Bushberger now renews his arguments concerning the legality of the search and also requests a new trial on the charge of obstructing an officer. He contends that the obstruction charge was the fruit of the illegal search, that knowledge of the contents of the briefcase produced jury bias against him, and that the jury would probably have reached a different verdict had they known of the officers' improper search.

We first consider Bushberger's contentions concerning the legality of the search. The issues raised regarding the propriety of the search of the briefcase are questions of law rather than fact. Accordingly, this court reviews the issues independently, without deference to the trial court. ***State v. Tompkins***, 144 Wis.2d 116, 121, 423 N.W.2d 823, 825 (1988).

Searches made without prior approval by a judge or magistrate are unconstitutional under the Fourth Amendment to the United States Constitution, unless the circumstances of the search bring it within one of the specific, well-delineated exceptions to the rule. ***Katz v. United States***, 389 U.S. 347, 357 (1967). Article I, sec. 11 of the Wisconsin Constitution is virtually identical to the Fourth Amendment, and the Wisconsin Supreme Court has therefore conformed Wisconsin's law of search and seizure to that developed by the United States Supreme Court. ***State v. Fry***, 131 Wis.2d 153, 171-72, 388 N.W.2d 565, 573, *cert. denied*, 479 U.S. 989 (1986).

One of the exceptions to the warrant requirement is the search "incident to a lawful arrest." ***United States v. Robinson***, 414 U.S. 218, 235 (1973); ***New York v. Belton***, 453 U.S. 454, 457 (1981). The policies underlying this exception are the need to allow the seizure of items which might be used to effect an escape or to assault an officer and the need to prevent the destruction of evidence of the crime. ***Preston v. United States***, 376 U.S. 364, 367 (1964); *see* ***Fry***, 131 Wis.2d at 174-75, 388 N.W.2d at 574; § 968.11, STATS. In ***Belton***, for example, the defendant was stopped for speeding. The officer noticed an envelope on the car's floor with a label he associated with marijuana. The occupants of the car were arrested for marijuana possession, and the officer searched the vehicle's passenger compartment. He discovered cocaine inside a jacket in the back seat. The Court held that when an officer has made a lawful arrest of the occupant of an automobile, the officer may search the passenger compartment and the contents of any containers found within. ***Belton***, 453 U.S.

at 460. In the present case, the arrest of Bushberger was lawful, and the officers were therefore entitled to make a search of the visable portions of the vehicle.

The justifications for the incident to arrest exception to the warrant requirement are lacking, however, when the search is remote in time or place from the arrest, or when the danger of the defendant destroying evidence or obtaining a weapon has passed. Thus, in ***Preston***, after police conducted a warrantless search of an impounded car at the police garage, the Court overturned the search, concluding that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." ***Preston***, 376 U.S. at 367. Moreover, in ***Day v. State***, 61 Wis.2d 236, 212 N.W.2d 489 (1973), *cert. denied*, 417 U.S. 914 (1974), the Wisconsin Supreme Court held that a search of an impounded car after officers noticed seemingly stolen goods through the windows was not incident to the arrest. The court explained, "a search can be considered incident to an arrest only if it bears a relationship of contemporaneity to the arrest and is confined to the vicinity of the arrest." ***Id***. at 248, 212 N.W.2d at 495. The term "contemporaneous" was later defined by the court in ***Fry***: "a search is contemporaneous with an arrest as long as the search begins immediately after the arrest and the defendant remains at the scene." ***Fry***, 131 Wis.2d at 180, 388 N.W.2d at 577. The search of Bushberger's briefcase did not begin immediately after the arrest, nor was it conducted in the vicinity of the arrest while Bushberger remained at the scene. It was not, therefore, contemporaneous within the meaning of ***Fry***.

More importantly, in ***United States v. Chadwick***, 433 U.S. 1 (1977), officers arrested a train passenger suspected of drug smuggling and seized a footlocker which they suspected contained drugs. The officers searched the footlocker at the police station approximately an hour later, without a warrant, and the Court ruled that the search could not be justified as incident to the arrest. ***Id.*** at 13-15. The Court held that the expectation of privacy is greater with regard to luggage than with an automobile. Moreover, once the police had taken possession of the footlocker and safely transported it to the station, it was under their exclusive control. Because there was no exigency supporting the need for an immediate search, the defendant was then entitled to the protection of the Warrants Clause and the evaluation of a magistrate before his privacy interest in the footlocker could be violated. ***Id.***

In cases with facts similar to those in the case at hand, courts of appeal have held that ***Chadwick*** applies. For example, in ***United States v. Berry***, the Seventh Circuit Court of Appeals ruled that the search of an attache case by police just eight minutes after the suspect had been arrested and removed from the scene could not be characterized as incident to the arrest.[1] ***United States v. Berry***, 560 F.2d 861, 864 (7th Cir. 1977). Also, in ***United States v. Schleis***, police had arrested a subject for cocaine possession and transported him to the jail. They searched the suspect's locked briefcase at the police station, without a warrant. The Eighth Circuit Court of Appeals originally upheld the

[1] Although the first ***Berry*** court found that ***Chadwick*** applied and the search was not properly incident to the arrest, the search was nevertheless upheld upon rehearing because the second court declined to apply ***Chadwick*** retroactively. See ***United States v. Berry***, 571 F.2d 2 (7th Cir.), *cert. denied sub. nom.* ***Wilson v. United States***, 439 U.S. 840 (1978).

search, but reversed it upon rehearing in light of ***Chadwick***. The court also noted that a briefcase carried the same expectation of privacy as luggage. ***United States v. Schleis***, 582 F.2d 1166, 1172 (1978).

We therefore conclude that ***Chadwick*** and its progeny apply in this case as well. Bushberger's briefcase came into the exclusive control of the police when it was removed from his car and transported to the police station while Bushberger sat handcuffed in the squad car. The danger of Bushberger removing evidence or obtaining a weapon from the briefcase had passed and with it passed the justification for a warrantless search. The trial court's concern that windy conditions at the roadside might cause papers or other evidence to blow away in the wind is simply not supported by the record.

Having established that the search cannot be justified as incident to the arrest, we must consider whether it comes within any other permitted category. The State argues on appeal that the search was a permissible inventory or safekeeping search.[2] An inventory search, designed to protect police from claims of theft or damage to a defendant's property, is another exception to the warrant requirement. ***South Dakota v. Opperman***, 428 U.S. 364, 367-69 (1976); ***Illinois v. Lafayette***, 462 U.S. 640, 643-44 (1983). A proper inventory search is conducted only when police are following a formal,

[2] Bushberger contends that because the State did not argue that the search was an inventory search at the trial level, it may not do so for the first time on appeal. An appeals court may affirm a trial court's ruling on grounds other than those presented to the trial court. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

established procedure. The policy underlying this principle is that the inventory search must not be merely a disguised search for evidence. ***Florida v. Wells***, 495 U.S. 1, 4 (1990). Nothing in the record suggests that the search of Bushberger's briefcase was part of such a formal department procedure. In addition, Murphy testified at trial that he believed he could have opened the briefcase at the scene, but decided to bring it to the station "for safekeeping." Nonetheless, this testimony is contradicted by his testimony at the suppression hearing:

Q: So I have this clear then you weren't taking the briefcase as a custodial to make make [sic] sure it what [sic] in safe keeping, correct?
A: At that point no.
Q:Well at no point did you just take it for some safe keeping, is that correct?
A: Correct.

The search of the briefcase, then, does not fit any of the exceptions to the requirement for a search warrant.[3] The ruling of the trial court is reversed and so are the convictions for processing marijuana and drug paraphernalia. The case is remanded for further proceedings consistent with this opinion.

We now address Bushberger's contention that in the interest of justice a new trial should be granted on the charge of obstructing an officer. He

[3] The search would be valid had Bushberger consented to it. The trial court noted the divergent testimony on this matter but declined to make a finding of fact, basing its ruling solely on the incident to an arrest exception. Similarly, the State has not argued consent as an independent justification for the search, nor does the record warrant a finding of consent.

asserts that the charge emanated from the illegal search—that the charge was the "fruit" of the search's "poisonous tree."

The evidence obtained by the illegal search, however, was not necessary for the State to prove any of the four elements of that crime. *See* WIS J I—CRIMINAL 1766. The record reveals that Murphy intended to perform sobriety tests on Bushberger even before he became aware of the briefcase. The obstruction charge emanated from Bushberger's reaction to the administration of those tests. While the improper search understandably irritated Bushberger and contributed to the state of mind that led to his resistance, it did not in any way justify that resistance.

Bushberger has cited ***Wong Sun v. United States***, 371 U.S. 471 (1963), in support of his contention that the charge emanated from the illegal search. In that case, however, the police used statements made by a suspect during an unlawful arrest to locate narcotics, and the narcotics clearly would not have been found except for the police misconduct. ***Id.*** at 488. In the present case, the charge of obstructing an officer was not "come at" by exploitation of the illegality, but rather by independent means distinguishable from that illegality.

Bushberger also argues that the jury would probably have reached a different verdict on the obstruction charge had the evidence been suppressed, since knowledge of Bushberger's possession of drugs and paraphernalia produced bias against him. Alternatively, he argues that had the jury known of the illegal search, the police officers' credibility would have been damaged, and

the jury's assessment of their testimony would have been different. The verdicts, however, suggest that the jury was not biased against Bushberger because of its knowledge of his drug possession. If bias had existed for that reason, it is unlikely he would have been acquitted on the OWI charge.

For this court to reverse a conviction, the evidence when viewed in the light most favorable to the State and the conviction must be so insufficient that no trier of fact could reasonably have convicted. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The suppression of the evidence and the lack of testimony about the officers' improper search do not so alter the sufficiency of the evidence against Bushberger that a new trial is warranted. We know of no case law, nor does Bushberger cite any, holding that a new trial is warranted solely because knowledge of a police officer's error might alter the jury's view of an officer's credibility. A reasonable jury could understandably find that Bushberger's actions satisfied each of the elements required for conviction of obstructing an officer. We therefore affirm the conviction on that charge.

By the Court. – Judgment affirmed in part and reversed in part with directions.

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