COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1170-CR **Cir. Ct. No. 2011CF140**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY J. COPELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J. and Reilly, J.

¶1 PER CURIAM. Gregory J. Copeland appeals from a judgment of conviction for possession with intent to deliver cocaine entered upon his no contest plea following the trial court's denial of his suppression motion. Copeland contends that the warrantless installation of and surveillance with a global

positioning system (GPS) device on his car was an unlawful search and that any derivative evidence should be suppressed. The State agrees that the GPS device search[1] was unlawful, but argues that the good faith exception to the exclusionary rule applies. We conclude that because the officers conducted the GPS device search in objectively reasonable reliance on then-existing precedent, the good faith exception applies and renders exclusion an inappropriate remedy. We affirm the trial court's denial of Copeland's suppression motion.

¶2 In March 2011, suspecting that Copeland was involved in drug trafficking, police attached a GPS device to Copeland's rental car and tracked its movements. The GPS device search was done without a warrant. The officers soon coordinated a traffic stop of Copeland's car based on information obtained from the GPS device.[2] Pursuant to a positive canine alert during the course of the traffic stop, police searched the car and discovered approximately twenty grams of marijuana and over eleven ounces of cocaine. Copeland was charged with possession of THC as a second or subsequent offense and possession with intent to deliver cocaine.

¶3 Copeland filed a suppression motion alleging that the GPS installation and surveillance constituted an unlawful search under the Fourth Amendment pursuant to ***United States v. Jones***, 565 U.S. ___, 132 S. Ct. 945 (2012), a United States Supreme Court decision released after the search of

[1] Where appropriate we will refer to the officers' installation of the GPS device and subsequent surveillance of Copeland's car as a "GPS device search."

[2] Though Copeland was stopped for speeding, the parties agree that police were only aware of his location and monitoring his travel through GPS technology.

Copeland's car but during the pendency of his case.[3] The trial court ruled that the GPS device search was unconstitutional under ***Jones***, but declined to suppress the derivative evidence. The trial court noted that at the time of the search, there was a published Wisconsin case holding that "no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view." ***State v. Sveum***, 2009 WI App 81, ¶1, 319 Wis. 2d 498, 769 N.W.2d 53 (***Sveum I***), *aff'd*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317 (***Sveum II***). The trial court concluded that the good faith exception applied to bar exclusion of the evidence in this case. Copeland was convicted and sentenced pursuant to his no contest plea.

¶4 On appeal, the parties agree that ***Jones*** overruled ***Sveum I*** and that ***Jones*** applies retroactively, rendering the GPS device search of Copeland's car unconstitutional. *See* ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987) (newly announced constitutional rules apply "retroactively to all cases, state or federal, pending on direct review or not yet final."). At issue in this case is whether despite the illegality of the search, the good faith exception to the exclusionary rule precludes suppression of the derivative evidence. This case presents a question of constitutional fact. ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. While we accept the trial court's factual findings unless

[3] In ***United States v. Jones***, 565 U.S. ___, 132 S. Ct. 945, 949 (2012), the Supreme Court held that the installation of a GPS device on a person's car for the purpose of gathering information, along with the use of the device to track the car's movements, constituted a Fourth Amendment search. Though Copeland's suppression motion alleged additional grounds for challenging the search, none are raised on appeal and we deem them abandoned. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).

clearly erroneous, the application of constitutional principles to those facts is a question of law that we review de novo. ***Id.***

¶5 We conclude that Copeland is not entitled to suppression of the evidence derived from the unlawful GPS device search of his car because officers conducted the search in objectively reasonable reliance on ***Sveum I***. *See* ***Davis v. United States***, 564 U.S. ___, 131 S. Ct. 2419, 2423-24 (2011); ***Dearborn***, 327 Wis. 2d 252, ¶51.[4] The good faith exception provides that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." ***Davis***, 131 S. Ct. at 2423-24. ***Davis*** addressed the good faith exception in the context of an automobile search performed prior to the United States Supreme Court's decision in ***Arizona v. Gant***,[5] a case overturning the well-settled bright- line rule in many jurisdictions permitting the search of an arrestee's car incident to arrest. ***Davis***, 131 S. Ct. at 2424-26. Distinguishing between the retroactive application of a new rule of constitutional law and the application of the good faith exception to the exclusionary rule, the ***Davis*** Court ruled that though its automobile search was unlawful under ***Gant***, suppression was not an appropriate or available remedy. ***Id.*** at 2431-32, 2434. The ***Davis*** Court reasoned that the sole purpose of the exclusionary rule is to deter police misconduct and that where police perform a search that is authorized by then-existing precedent, society's interest in deterrence is not sufficient to justify

[4] ***Davis v. United States***, 564 U.S. ___, 131 S. Ct. 2419, 2434 (2011), and ***State v. Dearborn***, 2010 WI 84, ¶51, 327 Wis. 2d 252, 786 N.W.2d 97, apply the same analysis to similar facts and arrive at the same conclusion, namely that the good faith exception bars suppression where officers conduct a search in reliance on then-existing precedent that is later deemed unconstitutional. We will cite to ***Davis*** because it is more recent and was decided by the United States Supreme Court.

[5] ***Arizona v. Gant***, 556 U.S. 332 (2009).

exclusion. ***Id.*** at 2432-34. The Court emphasized that "[p]olice practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system." ***Id.*** at 2428 (citations omitted). The ***Davis*** Court held:

> Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

Id. at 2423-24.

¶6 In the present case, at the time officers installed the GPS device on Copeland's car, ***Sveum I*** was binding authority and officers were entitled to rely on its holding in determining that the GPS installation and monitoring of Copeland's car was not a Fourth Amendment search or seizure requiring a warrant. Though ***Jones*** later overruled ***Sveum I***, "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." ***Dearborn***, 327 Wis. 2d 252, ¶4.

¶7 Copeland argues that the good faith exception should not apply because the law concerning GPS device searches was not well settled prior to ***Jones***. He attempts to distinguish ***Davis*** by asserting that whereas ***Gant*** overruled long-standing federal precedent, ***Jones*** did not overturn existing United States Supreme Court precedent and "makes no reference to any decision being overruled." Even if accurate, Copeland's distinction is immaterial. The police relied on ***Sveum I***, which constituted binding precedent. "[W]hen binding

appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." ***Davis***, 131 S. Ct. at 2429 (alteration in original). It is irrelevant for purposes of the good faith exception whether the existing precedent derived from the United States Supreme Court or the Wisconsin Court of Appeals, and whether it was in existence for two decades or two years. The lynchpin of the ***Davis*** decision is the lack of any meaningful deterrent benefit in suppressing evidence where police do not defy the law but instead rely on existing precedent.

¶8 We also reject Copeland's suggestion that ***Sveum I*** was not clear precedent because its viability was called into question by ***Sveum II***. ***Sveum II*** did not overrule ***Sveum I***, it affirmed.[6] ***Sveum II***, 328 Wis. 2d 369, ¶74. In affirming, the Wisconsin Supreme Court addressed a separate issue and held that even assuming a warrant was required, the order issued by the trial court satisfied the constitutional and statutory requirements for a valid warrant. ***Id.***, ¶¶2-3. The court did not overrule ***Sveum I***'s interpretation of the Fourth Amendment as it relates to GPS technology:

> In ***State v. Sveum***, … (***Sveum I***), we held that "no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view." ***Sveum I*** was affirmed on other grounds in … (***Sveum II***), so it is binding.

[6] This stands in sharp contrast to the situation where a decision of this court is expressly overruled by the Wisconsin Supreme Court. An overruled decision of this court retains no precedential value unless the supreme court expressly states otherwise. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78.

State v. Brereton, 2011 WI App 127, ¶6, 337 Wis. 2d 145, 804 N.W.2d 243. This court's decision in ***Sveum I*** was therefore binding in Wisconsin when officers installed the GPS on Copeland's car, and remained binding until the Supreme Court decided ***Jones***.

¶9 In sum, the officers conducted their GPS device search of Copeland's car in objectively reasonable reliance on binding appellate precedent and suppression would impose "substantial social costs" without yielding "appreciable deterrence." ***Davis***, 131 S. Ct. at 2426-27 (citations omitted). Under ***Davis***, the good faith exception to the exclusionary rule precludes suppression of the derivative evidence.

By the Court.—Judgment affirmed.

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