

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2015

Diane M. Fremgen
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. 2014AP842-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2013CM628

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. WAGNER,

DEFENDANT-APPELLANT.

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

¶1 BROWN, C.J.¹ We must determine whether two city of Plymouth police officers lawfully searched David Wagner's person. This case boils down to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to Wisconsin Statutes are to the 2013-14 versions unless otherwise indicated.

a dispute over whether Wagner voluntarily consented to the search or merely acquiesced to police officers' demands that he thought he had to follow. The circuit court looked at the totality of the circumstances and determined that Wagner voluntarily consented to the search. We agree with the circuit court's findings and affirm.

Facts

¶2 On July 4, 2013, at about 4:23 p.m., a city of Plymouth police officer stopped Wagner for driving a vehicle that had multiple items hanging from the rearview mirror and a blue tarp covering one of the rear windows. The officer knew the car belonged to Amy Prening, whom he and his police department had dealt with several times for ordinance violations, drug charges, and probation violations.

¶3 When the officer turned on his squad car's emergency lights Wagner pulled over normally, without any delay. The officer noticed that Wagner seemed "jittery" and made several movements. The movements the officer observed included Wagner reaching over to the passenger seat and moving an arm behind his back toward the waistband area. The officer was concerned that Wagner may have been reaching for a weapon, so he requested backup.

¶4 After the backup officer arrived, the detaining officer, accompanied by a police force intern, approached the vehicle, explained the reason for the stop, and asked for identification. At first, Wagner could not produce any identification. While Wagner sat in the vehicle, the detaining officer saw him put his hands in his pockets. This movement increased the detaining officer's concern that Wagner may have had a weapon. The detaining officer returned to his patrol car without receiving any form of identification from Wagner. After a brief period

of time, Wagner held a bank identification card out of the window, which the backup officer took and delivered to the detaining officer. Upon identifying Wagner, the detaining officer realized that he and his department had previous run-ins with Wagner for drug offenses.

¶5 From the time he arrived on the scene, the backup officer continuously watched Wagner. The detaining officer had already informed the backup officer about the movements Wagner initially made. The backup officer saw Wagner appear to make movements behind his back and under his seat, but could not tell specifically what Wagner was doing. He watched Wagner twist his torso and move his hands out of sight. After seeing Wagner make these movements, the backup officer asked him to exit the vehicle. Wagner got out of the car and moved to the sidewalk.

¶6 After Wagner got out of the car he put his hands in his pockets, and he and the detaining officer had this exchange, as recorded on the officer's squad camera:

[Detaining Officer]: David, actually come back here towards me. Come here once. All right. I don't want your hands going in your pockets anymore.

[Wagner]: OK.

[Detaining Officer]: When I pulled up behind you, you were all jittery and moving around in your car, OK?

[Wagner]: OK.

[Detaining Officer]: So, I have ... with that, I have permission to search this car. I'm also going to ask you what do you have on you that you shouldn't have?

[Wagner]: Nothing.

[Detaining Officer]: So, you don't mind if I search you, right?

[Wagner]: Go ahead.

¶7 The detaining officer searched Wagner’s person, and he found an eight-millimeter socket wrench attachment with burnt, black edges. Wagner told the officer he used the item to smoke marijuana, and an on-site test confirmed the presence of THC. The officers arrested Wagner, and prosecutors charged him with misdemeanor possession of drug paraphernalia as a repeater in violation of WIS. STAT. §§ 961.573(1) and 939.62(1)(a). Wagner moved to suppress the evidence. The circuit court denied this motion, holding that the officers gained Wagner’s voluntary consent to search his person. Wagner then pled no contest to the paraphernalia charge and now appeals the circuit court’s denial of his motion to suppress.

Analysis

¶8 A review of a motion to suppress presents this court with a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. We evaluate the circuit court’s findings of fact under a clearly erroneous standard. *Id.* Then, we evaluate the application of these facts to constitutional principles de novo. *Id.* In this case, the parties do not dispute any of the circuit court’s findings of fact, so we are left with a question of law that we review independently.

¶9 Wagner argues that the police officers he dealt with made it seem like he had no choice but to consent to their demands. When a police officer conducts a warrantless search based on the consent of the defendant, the consent must “be freely and voluntarily given.” *State v. Johnson*, 2007 WI 32, ¶16, 299 Wis. 2d 675, 729 N.W.2d 182. A defendant does not give consent if he or she simply “acquiesce[s]” to an officer’s “unlawful assertion of police authority.” *See*

id. To determine whether a defendant freely and voluntarily consented to a search requires us to make a factual inquiry by looking at the totality of the circumstances. *State v. Bermudez*, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998). Wagner claims the police officers unlawfully said they had “permission” to search his vehicle, which made Wagner feel that he had no choice but to consent to a search of his person as well.

¶10 Wagner relies almost entirely on *Johnson* to show that the police officers did not have legal authority to search his car. In *Johnson*, two police officers pulled over a vehicle and witnessed the driver make a single furtive movement where he seemed to reach underneath his seat. *Johnson*, 299 Wis. 2d 675, ¶3. The State argued that Johnson’s movement justified the officers’ protective search of the car. *Id.*, ¶34. The court noted that it looks to the totality of the circumstances to decide whether police officers have reasonable suspicion to justify a protective search. *Id.*, ¶36. The court held that a single furtive movement, by itself, does not create reasonable suspicion to justify a protective search of a vehicle. *Id.*, ¶43.

¶11 The circumstances of Wagner’s interaction with the police differ greatly from Johnson’s. First, Wagner made continuous furtive movements throughout the time he remained in his car, not just a single furtive movement as the detaining officer pulled him over. Second, Wagner made movements behind his back and towards his waistband, which indicated to the officers he could be reaching for a gun. Third, the police officers saw Wagner put his hands in his pockets. See *State v. Kyles*, 2004 WI 15, ¶41, 269 Wis. 2d 1, 675 N.W.2d 449 (“Officers have a legitimate, objective concern for their own safety when an individual reaches into his pockets.”). Fourth, the police officers also knew that Wagner and the owner of the car had been arrested for drug offenses in the past,

which are crimes strongly associated with the possession of weapons. *See Johnson*, 299 Wis. 2d 675, ¶38. Despite Wagner’s argument to the contrary, prior knowledge by police of a subject’s past drug history is a factor that a reasonable police officer may consider. Given the totality of the circumstances, we hold the officers did have reasonable suspicion to justify a protective search of the car.

¶12 We must still determine whether, even if the police had justification to do a protective search of the car, Wagner validly consented to the search of his person. On this issue, we hold that, after reviewing the totality of the circumstances, Wagner voluntarily consented. The detaining officer unusually phrased his request to search Wagner, by saying he had “permission” to search the car and then tacking on, “So you don’t mind if I search you, right?” Obviously, from the record, nobody gave the officer “permission” to search. So, the question is whether the word “permission” is such a loaded word that a person in Wagner’s position would think that a judge, or a magistrate, or a higher ranking officer gave that permission and that is what caused him to acquiesce. We can only guess. And guessing is not going to help Wagner. The bottom line is, whether the police had “permission” or had justification to do a protective search of the vehicle, the message was the same. The officers were telling him that they had the right to search his car. What happened after that message was told to him in the form of a question: “So you don’t mind if I search you, right?,” which was, we agree, temporally tied to the message that the police had the authority to search the car. But, it was still in the form of a question. It did not convey the impression that he had no real choice in the matter. Quite the opposite. Wagner had to know that, despite the knowledge that the officers had the right to search his car, they were nonetheless asking him for permission to search his person. In that light, we are convinced that Wagner could have refused if he had wanted. The totality of the

circumstances satisfies us that Wagner did give voluntary consent to the police and did not merely acquiesce to an unlawful demonstration of police authority.

By the Court.—Judgment affirmed.

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

