COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0337-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

STEPHEN R. MCCANN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Reversed and cause remanded.*

SNYDER, P.J. The State appeals from an order suppressing evidence seized from Stephen R. McCann's automobile on June 5, 1997. The State contends that McCann voluntarily consented to the search of his vehicle and that the consent was not tainted by police misconduct concerning the scope of the search inquiry. We agree and reverse the suppression order.

McCann's pro se motion sought suppression of drug evidence seized from his vehicle during a traffic stop because the police officer repeatedly requested to search his vehicle and McCann did not consent to the search. City of Mequon Police Officer Gregory Klobukowski provided the only record evidence at the suppression hearing. The trial court suppressed the drug evidence based upon McCann's "unwillingness to allow the search" and because the search was "unduly intrusive." McCann did not testify or present evidence at the suppression hearing.

Klobukowski testified that on June 5, 1997, he stopped McCann for operating his vehicle in the City of Mequon with a burnt-out right brake light and a burnt-out left taillight. During the stop, Klobukowski noticed that McCann was "extremely nervous and agitated and visibly shaking." Klobukowski issued McCann a warning for defective equipment and then asked McCann if he was carrying "any contraband or guns, knives or illegal drugs in his vehicle." McCann replied that he was "in a hurry." Klobukowski then asked McCann if he could search the vehicle and testified that McCann "said that would be okay."[1]

McCann argued to the trial court that when Klobukowski asked to search his vehicle, "I told [Klobukowski] 'no' because I was in a hurry to get to Menard's." Klobukowski conceded that he was unable to recall McCann's exact words, but testified that McCann used "words to [the] effect" that it was okay to search the vehicle. During the search Klobukowski discovered

[1] On direct examination, Klobukowski testified that he asked to search McCann's vehicle once. However, on cross-examination he stated that he had asked to search McCann's vehicle more than once but could not recall the number of times.

tetrahydrocannabinols (THC) and drug paraphernalia resulting in McCann being charged with a violation of § 961.41(3g)(e), STATS.

We first address whether the request to search McCann's vehicle was unduly intrusive. It is undisputed that this was a defective equipment traffic stop. The detention of a person by police during a brief traffic stop constitutes a Fourth Amendment seizure and must not be "unreasonable" under the circumstances. *See* ***State v. Gaulrapp,*** 207 Wis.2d 600, 605, 558 N.W.2d 696, 698 (Ct. App. 1996). McCann does not contest that Klobukowski's initial defective equipment stop of his vehicle was permissible under the Fourth Amendment. Individuals have a constitutional right to be free from unreasonable searches and seizures.[2] Whether a search is reasonable involves a question of constitutional fact. *See* ***State v. Kieffer,*** 217 Wis.2d 531, 541, 577 N.W.2d 352, 356 (1998). Accordingly, a reviewing court will decide such "constitutional questions independently, benefiting from the analysis of the circuit court." ***Id.*** at 541, 577 N.W.2d at 356-57.

McCann argues that the permissible traffic detention was wrongly expanded by the police inquiry about contraband and the request to search his vehicle. We disagree. Whether a contraband inquiry and the search request unrelated to a permissive traffic stop violate a person's Fourth Amendment rights has been addressed in ***Gaulrapp***. Gaulrapp was stopped for a muffler violation and the officers inquired whether he had any drugs or weapons inside his vehicle. *See* ***Gaulrapp****,* 207 Wis.2d at 603, 558 N.W.2d at 698. Gaulrapp said that he had none, at which point the officers asked whether they could search his person for

[2] *See* WIS. CONST. art. I, §11; U.S. CONST. amend. IV.

any contraband. Gaulrapp consented and the officers subsequently found drug material on Gaulrapp and in his vehicle. *See* ***id.*** at 603-04, 558 N.W.2d at 698. Like McCann, Gaulrapp argued that the drug evidence should be suppressed because the police had illegally expanded the scope of the permissive traffic detention by asking about drugs and weapons and for permission to search his person and vehicle. *See* ***id.*** at 605-08, 558 N.W.2d at 699.

Citing to ***Ohio v. Robinette,*** 519 U.S. 33, 117 S. Ct. 417 (1996),[3] we held that the police had acted properly in asking to search Gaulrapp's person and vehicle during the routine traffic stop. *See* ***Gaulrapp***, 207 Wis.2d at 607-08, 558 N.W.2d at 699-700. In support of the holding, we noted that a seizure does not take place when police merely ask questions of an individual or ask to search his or her person, so long as the police do not convey that compliance with the request is required. *See* ***id.*** at 609, 558 N.W.2d at 700. The record does not support a police conveyance to McCann that compliance with the search was required.

Because the McCann facts are consistent with those in ***Gaulrapp*** concerning the expansion of a permissive traffic stop to an additional police inquiry and a request to search, and because we held that such an expansion is constitutionally permissible, we conclude that the trial court erred in suppressing the contraband evidence on the basis that the police questioning and inquiry were impermissibly intrusive.

[3] Like McCann, Robinette was stopped for a traffic offense (speeding) and asked if he was carrying any contraband in his car. He replied that he was not and subsequently consented to a search of his vehicle. Drugs were discovered. *See* ***Ohio v. Robinette***, 519 U.S. 33, 117 S. Ct. 417, 419 (1996).

We next address whether McCann voluntarily consented to the search of his vehicle. Voluntariness of consent is a mixed question of constitutional fact and law, and we review the trial court's determination under the same two-step analysis as applied by the trial court. *See* ***State v. Phillips,*** 218 Wis.2d 180, 194, 577 N.W.2d 794, 801 (1998). We will not upset the trial court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 195, 577 N.W.2d at 801. However, we independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met. *See* ***id.***

As discussed in ***Phillips***, consent involves two questions: first, whether the defendant in fact consented to the search of his or her vehicle, and second, whether the consent was voluntary. *See* ***id.*** at 196-97, 577 N.W.2d at 802. As to the first question, Klobukowski testified that McCann consented to the search, although the officer could not recall some of the details of the traffic stop. Based upon Klobukowski's testimony, the trial court acknowledged that McCann had in fact consented, finding that "[t]he officer persisted and then the search was allowed." In light of McCann's failure to testify to the contrary, that finding of fact is not contrary to the great weight and clear preponderance of the evidence.

We next address whether the consent was voluntary. The question of voluntariness asks "whether consent to search was given in the absence of duress or coercion, either express or implied" and looks to the totality of the circumstances. *See* ***id.*** at 197, 577 N.W.2d at 802. Factors relevant to the totality of the circumstances of a search include: whether any misrepresentation, deception or trickery was used to persuade the defendant to consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the officer's request; the

defendant's physical and emotional condition, and prior experience with the police; and whether the officers informed the individual that consent could be withheld. *See* ***id.*** at 197-203, 577 N.W.2d at 802-05. The State must prove by clear and convincing evidence that consent is freely and voluntarily given. *See* ***id.*** at 197, 577 N.W.2d at 802.

The record consists solely of Klobukowski's testimony. His testimony does not support a conclusion that McCann was subjected to police deception, misrepresentation or trickery. There is no suggestion of physical or verbal intimidation. The only personal record information about McCann is a trial court comment that McCann is "no stranger to the Court," but that statement by itself does not reveal any prior police experience or contact by McCann.

While Klobukowski did not testify that McCann was informed of his right to withhold consent to search, the State "is not required to demonstrate the defendant knew that he could refuse to consent." *See* ***id.*** at 203, 577 N.W.2d at 804. In addition, police officers are not required to advise detainees that they are free to go before a consent to search is considered voluntary. *See* ***Robinette***, 519 U.S. at ___, 117 S. Ct. at 421. Nonetheless, the failure to inform a defendant weighs against a determination of voluntary consent.

Finally, the record supports that Klobukowski requested McCann's consent to search McCann's vehicle more than once. However, it does not support a finding that a request was made more than twice. The only evidence supporting an additional police request to search the vehicle was during Klobukowski's cross-examination by McCann:

Q What was the reason to ask a second time?

A Because the question wasn't answered.

The trial court noted that there was no evidence that McCann explicitly told Klobukowski "no" but found that McCann "indicated … an unwillingness to allow the search" by his response that he was in a hurry. Having previously found that McCann consented to the search, and without directly addressing the issue of whether the consent was voluntary, the trial court granted suppression on the basis that the search was "unduly intrusive in view of the nature of the offense that [McCann] was stopped for."

In sum, we conclude that the State has met its burden that the expanded inquiry and search request were constitutionally permissible and that McCann voluntarily consented to the search of his vehicle. It was not unreasonable for Klobukowski to repeat the request for consent to search the vehicle when McCann's first reply to the question was uncertain. Klobukowski's conduct in repeating the request did not constitute "actual coercive, improper police practices designed to overcome the resistance of a defendant." ***Phillips***, 218 Wis.2d at 203, 577 N.W.2d at 804 (quoted source omitted). Because we conclude that McCann's legal rights were not violated and that he voluntarily consented to the search of his vehicle, we reverse the order suppressing the drug evidence and remand the matter for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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