COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2547-CR **Cir. Ct. No. 2012CF38**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN M. THIMM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Benjamin M. Thimm pled no contest to one count of possession with intent to deliver tetrahydrocannabinols (THC) (>2500-10,000 grams) as a party to a crime (PTAC). He contends law enforcement did not have

reasonable suspicion to justify a stop of his vehicle. We disagree and affirm the judgment of conviction.

¶2 We appreciate the circuit court's excellent case summary and decision and borrow heavily from it. In December 2011, a confidential informant (C.I.) advised Washington county law enforcement (for brevity, "police") that someone with the Facebook name "Ben Marc," later identified as "Benjamin Mark Thimm," was distributing marijuana in the Hartford, Wisconsin area. The C.I. said Thimm offered to sell him "pounds" of it from California for $4000 a pound. The C.I. said he knew Thimm from school and the Hartford area. Washington County Multi-Jurisdictional Drug Unit officers had no prior dealings with the C.I. but they knew his name, address, telephone number, date of birth, and social security number.

¶3 A U.S. Postal Service inspector contacted the drug unit in January 2012 regarding a package he had intercepted. Sent from California and addressed to Thimm at his Hartford address, the package contained over 1000 grams, about 2.2 pounds, of marijuana. The inspector gave drug unit detective Peter Rank copies of four other postal labels from packages bearing California return addresses and delivered to Thimm's address and informed Rank that Thimm sent a package to "Walt Schafer" at 437 North Vermont Street in Glendora, California. All of the packages were sent or delivered in December 2011 and January 2012.

¶4 Through department of transportation (DOT) records, police verified Thimm's address, which had been provided to DOT on December 19, 2011. Police surveilled the address to verify the make, model, and license plate number of the car Thimm drove, a 1999 Honda Civic.

¶5 At Rank's direction, the C.I. contacted Thimm by text message to arrange the purchase of two pounds of marijuana. Thimm responded. He instructed the C.I. to contact him on his other cell phone for these transactions and to use the alias "Ryan Ocerus" for him.

¶6 In a series of text messages, the pair agreed on January 19 for a first transaction of one-half pound from California. Thimm came back empty-handed. In subsequent text and phone exchanges, Thimm indicated he was returning to California as early as Sunday, January 29, would be driving back to Wisconsin, and expected to arrive in Hartford "Friday-ish," February 3. Via Facebook, Thimm told the C.I. he would come back with "two for my buddy," meaning two pounds of marijuana for the C.I. at the agreed-upon price of $4000 a pound.

¶7 Rank learned that just one Chicago O'Hare-to-LAX[1] flight, on United Airlines, was scheduled for the day Thimm was to leave for California. Pursuant to a search warrant, police tracked Thimm's cell phones by GPS and monitored his travels from his Hartford address to an apartment complex in Des Plaines, Illinois, to O'Hare airport, to the Vermont Street address in Glendora, California, and back to the Des Plaines apartment complex. Rank personally observed Thimm return to the apartment complex, walk away from a light-colored vehicle with a Nevada registration, approach his Honda Civic, put something in the passenger seat, and get in and start driving, following the Nevada car out of the parking lot.

[1] Los Angeles International Airport.

¶8 The surveillance team followed the two vehicles as they proceeded north into Wisconsin. Over the approximately ninety-four-mile trip, the two vehicles stayed together, matched their speeds, used the same toll lanes, made no stops, and, when one changed lanes, the other followed suit. Rank directed Washington county sheriff's deputies to stop the two vehicles when they entered Washington county. The officers seized 4226.2 grams—over nine pounds—of marijuana, plastic sandwich bags, and a digital scale in two boxes in the trunk of the Nevada car. The driver of that car was identified as Walter Schafer, Jr. The police had observed no equipment malfunctions or traffic violations.

¶9 Thimm moved to suppress the evidence, claiming police did not have reasonable suspicion for the stop. After a two-part hearing, the circuit court denied the motion in a thorough written decision. Thimm entered a no-contest plea to the PTAC possession with intent to deliver charge. Unrelated bail jumping and disorderly conduct charges were dismissed and read in. This appeal followed.

¶10 Whether a stop was supported by reasonable suspicion presents a question of constitutional fact, to which we apply a two-step standard of review. ***State v. Walli***, 2011 WI App 86, ¶10, 334 Wis. 2d 402, 799 N.W.2d 898. The circuit court's findings of historical fact are upheld unless clearly erroneous. ***Id.*** We apply those facts to the applicable law de novo. ***Id.***

¶11 "[I]t is reasonable and consistent with Fourth Amendment protections for an officer to conduct a temporary, 'investigatory stop' of an individual if the officer has reasonable suspicion 'that criminal activity may be afoot.'" ***State v. Miller***, 2012 WI 61, ¶29, 341 Wis. 2d 307, 815 N.W.2d 349 (quoting ***Terry v. Ohio***, 392 U.S. 1, 8, 30 (1968); one set of internal quotations omitted). The essential question is whether law enforcement's action was

reasonable under all the facts and circumstances present. ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶12 "When police have relied, at least in part, on information from an informant, we balance two factors to determine whether officers acted reasonably in reliance on that information." ***Miller***, 341 Wis. 2d 307, ¶31. "The first is the quality of the information, which depends upon the reliability of the source. The second is the quantity or content of the information." ***Id.*** (citation and footnote omitted). The more reliable the informant, the less detail in the tip and police corroboration is required, and vice versa. ***Id.***, ¶32.

¶13 The circuit court addressed several factors in scrutinizing whether the drug unit officers were justified in concluding that the C.I. was reliable. It considered the C.I.'s "accountability risk," that is, the hazards of providing false information. The court found he was motivated to provide truthful information because he had requested release on electronic monitoring instead of jail in his own case and getting his request granted depended on the information's utility.

¶14 The court also considered the level of detail provided and the C.I.'s personal knowledge gained through direct contact with Thimm by telephone, text message, and Facebook to arrange the marijuana transactions. The C.I. provided copies of the text and Facebook messages and accurate details about Thimm's cell phone numbers, travel plans, and marijuana quantities and price. The court concluded those factors also weighed in favor of reliability.

¶15 Weighing against the C.I.'s reliability was the lack of a demonstrated history of his trustworthiness, although Rank confirmed that the C.I. gave a Milwaukee drug task force accurate information about an individual selling cocaine. Still, there was not an established relationship between the C.I. and this

drug unit. On balance, however, reliability won out. The court's reliability findings are not clearly erroneous.

¶16 The circuit court also examined whether the drug unit officers had a reasonable suspicion supported by articulable facts that criminal activity may have been afoot. The court found that much of the information the C.I. provided was corroborated before the traffic stop by phone, DOT, and car rental records, GPS, surveillance, Rank's observations of text and Facebook messages Thimm and the C.I. exchanged and the U.S. Postal Service's actions.

¶17 By those methods, police verified Thimm's cell phone numbers, his Hartford address, his alias, his access to substantial amounts of marijuana from California, recent multiple connections to California, his connection to the Glendora, California address, the C.I.'s pending purchase from Thimm of two pounds of marijuana from California, Thimm's use of the 1999 Honda Civic, his trip to the Des Plaines apartment complex and to the Glendora address, his time and travel schedule, his return to the Des Plaines apartment complex, and his ninety-four miles of uninterrupted, in-tandem travel with another vehicle from Des Plaines to Washington county. We agree with the circuit court's conclusion that the officers had more than sufficient facts to warrant a reasonable officer to suspect that both Thimm and Schafer had committed, were committing, or were about to commit crimes relating to the sale of marijuana.

¶18 Thimm nonetheless argues that circuit court erred. He suggests that Rank's affidavit in support of the search warrant was "materially incorrect" in a number of ways and was impeached by Rank's own testimony.

¶19 The affidavit averred that (1) Rank knew the C.I. to be reliable and truthful from past dealings, but later testified that this was their first association;

(2) sheriff's department records showed the cellphone number by which Thimm contacted the C.I. to be listed to Thimm, but there is no showing that the department "keeps a database of cell phone listings," and Rank conceded police did not verify with the service provider that Thimm was the account holder for the cellphone; (3) the street and city names in the California return address on the intercepted package did not match the Glendora address, and there is no evidence that Thimm solicited the package; (4) there is no evidence of either the contents of the four California packages delivered to Thimm's address between December 9, 2011 and January 7, 2012, or who accepted delivery; and (5) the dates of travel, while close, did not match, for example, Thimm said he would be back in Hartford "Friday-ish"—February 3—but did not arrive until 12:20 a.m. on February 4.

¶20 As to the first point, the circuit court either did not accept or gave very little weight to the averment. The court concluded that the C.I. had "no prior history of trustworthiness," and the lack of such a history "weighs against the confidential informant being reliable." As to the remaining four points, we are not persuaded that they make any difference. Regardless of who the cellphone was registered to, Thimm used it. Receipt of four packages from California in that many weeks, followed by the intercepted package of marijuana from California, raises suspicions. Twenty minutes into Saturday, February 4 is "Friday-ish."

¶21 Thimm also points out that the 1999 Honda Civic was not registered in his name, police did not subpoena the United Airlines flight manifest to verify that he was on the flight to LAX, two cars could be traveling in tandem for purely innocent reasons, no one witnessed him engaging in a drug transaction, there is no evidence that the C.I. provided information at a personal risk, as the reason he provided information was to gain favorable treatment for himself, and Rank

testified inconsistently when questioned whether the C.I. ever made personal-use purchases of marijuana from Thimm.

¶22 To the extent the last point even matters, "[i]nconsistencies and contradictions in a witness' testimony are for the [trier of fact] to consider in judging credibility." ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). As to the other points, Thimm essentially wants this court to draw different inferences from the facts than did the circuit court. "An appellate court must accept a reasonable inference drawn by the [circuit] court from established facts if more than one reasonable inference may be drawn." ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 237, 517 N.W.2d 658 (1994). We may reject an inference reached by the trier of fact only if the evidence on which that inference is based is inherently incredible. ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994). The circuit court's inferences are reasonable and not inherently incredible. We are bound by them. Law enforcement's action was reasonable under all the facts and circumstances.

By the Court.—Judgment affirmed.

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