COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2941

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

IN THE INTEREST OF CARLOS Z.T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CARLOS Z.T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

SCHUDSON, J.[1] Carlos Z.T. appeals from the adjudication of delinquency, following a court trial, for possession of marijuana with intent to

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

deliver. He contends that the trial court erred in denying his motion to suppress evidence. He argues that because the police stopped him unlawfully, the derivative evidence they obtained – both the marijuana and his confession – should have been suppressed. This court concludes that although the trial court erred in determining that the stop was lawful, the seizure of the marijuana and the interrogation of Carlos were sufficiently attenuated from the unlawful stop to allow for the admissibility of the derivative evidence. Accordingly, this court affirms.

The facts relevant to resolution of this appeal are undisputed. The testimony at the hearing on Carlos's motion to suppress evidence established that on the afternoon of November 9, 1997, City of Milwaukee Police Officer Luke Warnke and other officers stopped Carlos and others on a sidewalk, in response to a citizen complaint of "street dealing" of drugs. Carlos explains, however, that according to the testimony:

> There were no details of the type, number, description or age of the individuals who had reportedly taken part in street dealing at the reported address, nor did the officer know whether the reported dealing had taken place in a yard or on the street.
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> When the five officers arrived in two cars to respond to the complaint at 5:44 p.m., they observed four or five black males on the sidewalk one or two houses north of the address in the complaint. The 13-year-old appellant and his companions were standing on the sidewalk. They were not engaged in anything that appeared to be "drug activity[.]"

(Citations omitted.) Thus, Carlos argues, the stop was unlawful.

The State does not concede that the stop was unlawful, but offers absolutely no argument to counter Carlos's challenge. Thus, this court concludes that the State has acknowledged the validity of Carlos's arguments challenging the

stop, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted), and understandably so, *see* § 968.24, STATS.

The remaining issue in this appeal, therefore, is whether, notwithstanding the trial court's errors[2] in concluding that the stop was lawful, Carlos's marijuana and confession were admissible. Carlos has summarized the circumstances leading to the seizure of his marijuana and to the custodial interrogation:

> [T]he police approached these young men and informed them they were investigating a complaint of street drug dealing. Each of them were [sic] patted down for weapons and told to sit on some steps connected to a house. The police then obtained their names in order to run a "wanted check[.]" While these four or five individuals were being investigated, they were not free to leave.
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> While this was occurring, [Officer] Warnke testified the appellant, who was sitting on the steps as directed, reached into his crotch. He was told to stand up, take his hands out of his pants and approach the officer. When Warnke asked him if he had anything in his pants, the appellant replied affirmatively. He then shook his pants leg and a baggie Warnke believed to be marijuana fell out. The appellant was arrested.
>
> …[A]pproximately one and one-half hours after the arrest, appellant was interviewed by one of the other arresting officers in a room of the "Vice Control Division." After receiving Miranda warnings, the appellant confessed to buying and selling marijuana earlier in the day.

(Citations omitted.) Carlos's summary, while accurate, fails to include one important additional factor; Officer Warnke testified: "I told him to take his hand

[2] The trial court first concluded that the stop was a lawful part of the police "community caretak[ing] function." Upon reconsideration, the trial court recognized that its first conclusion was erroneous, but then incorrectly concluded that the stop was lawful under ***Terry v. Ohio***, 392 U.S. 1 (1968).

out of his crotch. I didn't know if there was a weapon or something else in his crotch."

The State argues that "[r]egardless of the constitutionality of [Carlos's] detention, the marijuana which the appellant produced and his confession to the drug dealing are attenuated from any alleged illegality and were not obtained through exploitation of the detention." This court agrees.

"Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact." ***State v. Phillips***, 218 Wis.2d 180, 204, 577 N.W.2d 794, 805 (1998). Where police obtain evidence as a result of a Fourth Amendment violation, suppression is required "unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence." ***Id.*** The supreme court articulated the criteria for measuring whether the State has made that showing:

> In ***Brown*** [***v. Illinois***, 422 U.S. 590 (1975)], the United States Supreme Court set forth three factors for determining whether the causal chain has been sufficiently attenuated: (1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. In the final analysis, however, the question is still whether the evidence objected to has come at the "exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint."

Phillips, 218 Wis.2d at 205-06, 577 N.W.2d at 805-06 (citations omitted).[3] This court concludes, under the ***Phillips*** criteria, that Carlos's conduct after being

[3] Although, the supreme court confirmed that the State had the burden to prove attenuation, *see* ***State v. Phillips***, 218 Wis.2d 180, 204, 577 N.W.2d 794, 805 (1998), it did not clarify the exact burden of proof. In reviewing the instant appeal, however, this court has assumed that the supreme court intended that the burden be by clear and convincing evidence. *See* ***State v. Kieffer***, 217 Wis.2d 531, 542, 577 N.W.2d 352, 357 (1998) (State must prove, by (continued)

stopped provided the police with a sufficiently attenuated basis for the lawful seizure of his marijuana. The discovery of the marijuana, in turn, provided probable cause for Carlos's arrest, and the subsequent custodial interrogation produced Carlos's confession.[4]

In the instant case, the parties compare Carlos's circumstances to those the supreme court evaluated in ***Phillips***, and fairly debate the "attenuation" question under each of the three criteria. This court's call is a very close one and, indeed, this court's capacity to measure the degree of attenuation here, in comparison to that in ***Phillips***, is further tempered by recognition of the three-justice dissent in ***Phillips***, disputing the majority's conclusions on all three ***Brown*** factors. *See* ***Phillips***, 218 Wis.2d at 213, 577 N.W.2d at 813 (Bradley, J., dissenting, joined by Abrahamson, C.J., and Bablitch, J.).

Still, in the instant case, this court concludes that, however close the call might be on the first and third ***Brown*** factors, the State's evidence clearly establishes "the presence of intervening circumstances" showing that the seizure of Carlos's marijuana came not "at the 'exploitation of a prior police illegality'" but, rather, "'by means sufficiently attenuated so as to be purged of the taint.'" ***Phillips***, 218 Wis.2d at 206, 577 N.W.2d at 806 (citations omitted). As the State argues:

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clear and convincing evidence, that "[the] warrantless search was reasonable and in compliance with the Fourth Amendment.").

[4] Although, occasionally and incidentally, Carlos's briefs separately articulate his challenge to the admissibility of his confession, his arguments are based almost entirely on the theories underlying his challenge to the marijuana. He acknowledges, however, that he received the ***Miranda*** warnings, and he presents nothing to suggest that his confession was involuntary. Thus, understanding that his arguments challenging the admissibility of the marijuana also are challenging the confession, this court will only address the former. Obviously, given this court's conclusion on "attenuation," both the marijuana and confession were admissible.

> After being asked to sit down and while officers were checking their names, the appellant suddenly shoved his hand into his pants. This created a reasonable fear that the appellant may be reaching for a weapon. To dispel this fear, Officer Warnke took the reasonable step of asking the appellant if he had anything in his pants. The appellant responded that he did and, apparently without request, shook his pants causing his drugs to fall out. The appellant's own unsolicited and unexpected actions broke the chain of causation from the allegedly illegal detention. Drugs were not found as the result of an additional search, but were produced by the appellant without request. Nothing the officers did caused the appellant to either shove his hands in his pants or reveal his marijuana. The appellant's actions were entirely independent and are "sufficiently [] acts of free will to purge the primary taint." [S]ee Brown v. Illinois, 422 U.S. 590, 602 (1975)[.]

(Footnote omitted).

The State is correct. Carlos's vague assertion in his reply brief, that "[i]ndeed, it was a contemporaneous occurrence," is belied by the record. Clearly, time passed between the initial police contact, the sitting on the step, and the reaching into the pants. Although the temporal lag was relatively brief, it was factually significant given the reasonable concern that Carlos might have been reaching for a weapon. Thus, this court concludes that although the stop was unlawful, the marijuana and confession were admissible. *See* ***State v. Holt***, 128 Wis.2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985) (if trial court reached right result but for wrong reason, we affirm).

By the Court.—Order affirmed.

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