

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2016

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. 2015AP1210-CR

Cir. Ct. No. 2012CF339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK S. BURGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Frederick Burger appeals a judgment convicting him of possession of marijuana with intent to deliver. The sole issue on appeal is whether the circuit court properly denied Burger's motion to suppress evidence

seized from Burger's vehicle without a warrant. For the reasons discussed below, we affirm.

STANDARD OF REVIEW

¶2 When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2013-14);¹ *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. *Id.*

BACKGROUND

¶3 The key facts found by the circuit court are not clearly erroneous. A Sauk County detective obtained a warrant to search Burger's residence for evidence of drug dealing. The application for the search warrant was based upon a tip from Burger's girlfriend's son that Burger was dealing large amounts of marijuana from the residence, in conjunction with the subsequent seizure of garbage from outside the residence on two separate occasions—which both yielded plant materials that tested positive for THC, as well as identifying documents linking Burger to the residence. In addition, the detective applying for the warrant noted that Burger had seven prior convictions for drug related offenses, two of which involved the manufacture and/or delivery of marijuana.

¶4 Just prior to executing the warrant, the same detective observed Burger's vehicle, with which the detective was familiar, approaching the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

residence. The detective activated his squad lights and siren, and Burger pulled to a stop directly in front of his residence, blocking his own driveway. Upon making contact with Burger in his vehicle, the detective smelled what he stated was the odor of raw marijuana emanating from inside the vehicle. This led to a search of the vehicle and Burger's arrest.

DISCUSSION

Detention

¶5 Burger first challenges the constitutionality of his traffic stop, contending that it fell outside the scope of the warrant to search his premises and was unsupported by reasonable suspicion.

¶6 Under *Terry v. Ohio*, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action would be appropriate. *Id.* at 21-22. “The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?” *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶7 The totality of the circumstances test takes into account “both the content of information possessed by police and its degree of reliability.” *State v. Sisk*, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877 (quoting another source). The police may reasonably deem information provided by a citizen informant about a crime in progress to be reliable when the citizen has identified

himself or herself, and the officer is able to corroborate some of the information provided. *State v. Powers*, 2004 WI App 143, ¶14, 275 Wis. 2d 456, 685 N.W.2d 869.

¶8 Here, the police had information from a named informant that Burger was involved in ongoing drug activity. That information had been partially corroborated by the search of garbage taken from the front of Burger's residence on two separate occasions, the last of which occurred only four days prior to the execution of the search warrant. In short, the information provided in the application for a search warrant of the residence also provided reasonable suspicion to temporarily detain Burger to question him about the alleged drug activity. It is therefore unnecessary to determine whether the vehicle was stopped within the "immediate vicinity" of the residence, so as to also fall within the scope of the warrant.

Search of Vehicle

¶9 Burger also challenges the constitutionality of the search of his vehicle, contending that it was not supported by probable cause. A police officer may reasonably search an automobile located in a public place if there is "probable cause to believe the vehicle contain[s] contraband or evidence of a committed crime." *State v. Tompkins*, 144 Wis. 2d 116, 137, 423 N.W.2d 823 (1988). The test for this court on review is "whether the circumstances would warrant a person of reasonable caution to hold the same belief." *Id.*

¶10 As we concluded, the detective properly effectuated the stop of Burger's vehicle. After stopping the vehicle, the officer approached Burger's vehicle and smelled the odor of marijuana emanating from it. Once the detective smelled the odor of marijuana, he had probable cause to believe that the vehicle

contained contraband, justifying the search. *See State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999). We therefore conclude that the circuit court properly denied Burger's suppression motion.

By the Court.—Judgment affirmed.

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

