COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP756-CR **Cir. Ct. No. 2014CF667**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK S. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Fredrick Smith appeals a judgment of conviction. We conclude that the State has failed to provide a meaningful legal response to Smith's argument that his suppression motion should have been granted.

Therefore, we vacate the judgment of conviction and order the circuit court to allow Smith to withdraw his plea and to grant the suppression motion.

¶2 Smith pled guilty to and was convicted of one count of operating while intoxicated. He appeals the denial of his suppression motion under WIS. STAT. § 971.31(10) (2013-14).[1]

¶3 After an evidentiary hearing, the circuit court found that the officer pulled over the car Smith was driving because a check showed that the driver's license of the vehicle owner was suspended. However, on approaching the vehicle, the officer noted that Smith did not appear to be the same gender as the owner. The officer continued to approach the car. The officer asked the driver to open the window, and then the door, but the driver said they were broken. The officer then went around to the passenger side and, according to the circuit court finding, opened that door. The officer then observed signs of intoxication.

¶4 Both parties agree that reasonable suspicion dissipated when the officer was first able to see Smith from five or ten feet away and conclude that he was not the owner. The disputed questions revolve around what the officer was permitted to do after that.

¶5 Smith first argues that the officer improperly extended the duration of the seizure after reasonable suspicion dissipated. For purposes of this order, we assume, without deciding, that the officer was permitted to continue the stop, that

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

is, continue the seizure, for the purpose of asking for the driver's identification and explaining why the officer initiated the stop.

¶6 Smith's second argument is that the officer was not permitted to open the passenger door without consent and without probable cause. Smith argues that the investigative methods used during a seizure must be, quoting case law, "the least intrusive means reasonably available to verify or dispel the officer's suspicion." ***Florida v. Royer***, 460 U.S. 491, 500 (1983). Here, Smith argues that opening the door did not comply with that requirement.

¶7 Smith separately argues that by opening the door the officer was conducting a search, again without consent or probable cause or any other exception to the warrant requirement. He argues that the officer's perceptions after the opening of the door should be suppressed as fruit of an illegal search.

¶8 The State's response to these arguments is cursory. The State does not address the two theories separately. The State does not place its argument in any specific legal framework, and does not cite any legal authority. The State does not dispute that opening the door was a warrantless search and does not argue that any specific exception to the warrant requirement justified a search. The State's argument is only that if the *driver's side* window and door were operational, Smith would have opened those, and the signs of intoxication would have been detected by the officer that way, leading to the same result as when it was the officer who opened the passenger door. Moreover, the logical extension of the State's theory seems to be that, if Smith had declined to open an operational driver's side window or door, the officer would have been authorized to open the door from the outside without consent.

¶9 Regardless, in this case the driver's door and window were *not* operational, as far as the officer knew. The State does not explain why we should analyze the case by considering what might have happened if the facts were different. The State's response appears to imply that the rule is, or should be, as follows:

> When:
>
> (1) an officer initiates a seizure based on reasonable suspicion,
>
> (2) that suspicion dissipates, and
>
> (3) the officer properly extends the seizure,

then the officer is permitted, without consent, to take an intrusive action, including an action amounting to a search, if the officer's action produces a result that the officer was permitted to ask the driver to create. However, the State does not cite any direct legal authority or authority-based analysis supporting such a rule.

¶10 Furthermore, if reasonableness is the legal test, it is not obvious that such a rule would be reasonable in all cases. It is normally more reasonable to ask before taking intrusive action. For example, even though an officer conducting a traffic stop may require a driver to exit the vehicle, ***Maryland v. Wilson***, 519 U.S. 408, 412 (1997), we question whether it would be held reasonable for an officer, without first asking the driver to exit, to open the car door and physically pull the driver out. While that example contains an element of physical force not present in our current case, the example is sufficient to show that the State's focus on the ultimate physical outcome appears flawed. So far as we are aware, the manner of achieving a result is part of the general reasonableness test.

¶11 Put simply, with respect to the passenger side door, the officer here acted without even asking for cooperation first. We are not presented here with the scenario in which an officer—properly approaching a driver, after reasonable suspicion had dissipated, to explain or request identification—asks a driver to open an operational driver's side window and the driver actively or passively declines to cooperate. Whether, in that scenario, the officer would be authorized to open the driver's side door without consent is, so far as we know, an open question. And, notably, we are one step removed from that scenario. Here, the officer did not even ask the driver to open the passenger side window or door, he just opened it. To repeat, if there is authority for this intrusive action, the State does not provide it.

¶12 We stress that we have not reached an opinion on the topic. We are not suggesting that, merely because it is often *more* reasonable for an officer to start by asking, this means it is always constitutionally *un*reasonable for an officer to act without asking first. Rather, the situation here is that Smith has presented a cogent legal argument with authority explaining that the officer's action violates the "least intrusive means" rule of ***Royer*** and that the action, revealing as it did the odor in the vehicle, amounts to a non-consensual search. In the face of this, the State has not even attempted to offer a legally developed explanation as to why the officer's intrusive action was permitted. Therefore, we conclude that Smith's argument has gone without a meaningful rebuttal, and we reverse on that basis. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (appellant's argument not refuted is conceded).

¶13 The State does not argue that the error was harmless because Smith would still have pled guilty even if the evidence had been suppressed. *See* ***State v. Semrau***, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376. Therefore, we

do not address that issue. After remittitur, the circuit court shall vacate the judgment of conviction, allow Smith to withdraw his plea, and grant the suppression motion.

By the Court.—Judgment reversed and cause remanded with directions.

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