COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP2425-CR
2015AP2426-CR

Cir. Ct. Nos. 2014CF349
2015CF188

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY C. EIGNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Reversed.*

APPEAL from a judgment of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy Eigner was charged with possession of drug paraphernalia and possession of methamphetamine based on evidence derived from a protective pat-down of Eigner's person following a traffic stop. In a separate case, Eigner was subsequently charged with three counts of bail jumping for missing scheduled drug tests in violation of the conditions of bond in the drug case. The drug case and the bail jumping case were consolidated for purposes of a plea and sentencing hearing, and were also consolidated on appeal. Eigner pleaded no contest to one count each of possession of methamphetamine and felony bail jumping. Eigner contends that: (1) the circuit court in the drug case erred in denying his motion to suppress evidence derived from the pat-down because the pat-down was not supported by reasonable suspicion that Eigner was armed and dangerous; and (2) the circuit court in the bail jumping case erred in denying his motion to dismiss the bail jumping charges based on a claim of prosecutorial vindictiveness.[1]

¶2 We conclude that: (1) Eigner did not give the officer consent to conduct the pat-down; (2) under the totality of circumstances, the officer lacked the requisite specific and articulable facts to justify the pat-down, and, therefore, the circuit court erred in denying Eigner's motion to suppress the evidence derived from the pat-down, on which the drug charges were based; and (3) Eigner fails to establish that the charging of the additional counts of felony bail jumping was prompted by prosecutorial vindictiveness. Accordingly, we reverse the judgment of conviction for possession of methamphetamine and affirm the judgment of conviction for bail jumping.

[1] The Honorable Scott L. Horne denied the motion to suppress in the drug case. The Honorable Elliott M. Levine denied the motion to dismiss in the bail jumping case.

BACKGROUND

¶3 Officer Casey Rossman of the La Crosse Police Department heard and saw three motorcyclists, at least some of whom were loudly revving their engines and spinning their tires while leaving the area of a bar at approximately 1:00 a.m. He followed and stopped one of the motorcyclists because of problems with the registration plate on that motorcycle. The stopped motorcyclist, later identified as Eigner, dismounted from his motorcycle after pulling over. Officer Rossman performed a pat-down of Eigner's person to search for weapons. Based on evidence derived from the pat-down, Eigner was charged with possession of drug paraphernalia and possession of methamphetamine and released on bond. His release was conditioned on, among other requirements, submitting to regular drug tests. Eigner subsequently missed three scheduled drug tests.

¶4 Eigner filed a motion to suppress the evidence derived from the pat-down. The circuit court held an evidentiary hearing and ordered briefing on the motion.

¶5 In the course of the briefing on the suppression motion, Eigner's counsel and the prosecutor exchanged emails in which the prosecutor stated that, if she was obligated to write "another brief" in response to the suppression motion, "I'll probably charge" the felony bail jumping "just to make it worth my while." Eigner's counsel filed a brief in support of the suppression motion pursuant to the circuit court's scheduling order and responded to the prosecutor that it was "important to litigate" the suppression motion.

¶6 The prosecutor subsequently filed the State's brief in opposition to Eigner's suppression motion, and a few weeks later filed a complaint in a separate action charging Eigner with three counts of felony bail jumping based on his three

missed drug tests. Eigner filed a motion to dismiss the bail jumping charges because of prosecutorial vindictiveness, based on the emails and the subsequent charging. The circuit court held a hearing at which the prosecutor made an offer of proof.

¶7 The circuit court denied the motion to suppress and the motion to dismiss. Following Eigner's pleas, this consolidated appeal followed.

DISCUSSION

¶8 Eigner raises two issues on appeal. First, Eigner contends that the circuit court erred in denying his motion to suppress evidence derived from the protective pat-down following the traffic stop.[2] Eigner argues that the protective pat-down was not supported by reasonable suspicion that he was armed and dangerous.[3] Second, Eigner contends that the court erred in denying his motion to dismiss the bail jumping charges based on prosecutorial vindictiveness. We address each issue in turn.

I. Protective Pat-Down

¶9 A protective pat-down, or frisk, "refers to 'measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of

[2] Eigner does not challenge the legal basis for the traffic stop.

[3] Eigner also argues that, even if the pat-down was justified, the evidence should be suppressed because the officer exceeded the permissible scope of a protective pat-down. We do not address this argument in light of our conclusion that the evidence should be suppressed because the pat-down was not reasonable under Fourth Amendment standards stated in case law. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

physical harm.'" ***State v. Kyles***, 2004 WI 15, ¶1, 269 Wis. 2d 1, 675 N.W.2d 449 (quoting ***Terry v. Ohio***, 392 U.S. 1, 24 (1968)). In the sections that follow, we review the relevant legal principles and standard of review, set forth the undisputed facts from the suppression hearing, apply the law to those facts to conclude that the pat-down was not constitutional, and explain why we reject the State's arguments to the contrary.

A. Legal principles and standard of review

¶10 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable seizures. ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. When we review the denial of a motion to suppress evidence based on an argument that it was obtained in violation of the Fourth Amendment, we uphold the circuit court's factual findings unless they are against the great weight and clear preponderance of the evidence. ***State v. McGill***, 2000 WI 38, ¶17, 234 Wis. 2d 560, 609 N.W.2d 795. We independently review those facts to determine whether the constitutional requirement of reasonableness is satisfied. ***Id.***

¶11 An officer may not perform a protective pat-down for weapons unless the officer has "reasonable suspicion that a person may be armed and dangerous to the officer or others." ***Kyles***, 269 Wis. 2d 1, ¶7. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." ***Id.***, ¶9 (quoting ***Terry***, 392 U.S. at 21).

¶12 "The reasonableness of a protective search for weapons is an objective standard, that is, 'whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [the person's] safety and that

of others was in danger' because the individual may be armed with a weapon and dangerous." ***Kyles***, 269 Wis. 2d 1, ¶10 (quoting ***Terry***, 392 U.S. at 27). We must evaluate the totality of circumstances in the particular case to decide whether an officer had the reasonable suspicion necessary to justify a protective pat-down for weapons. ***Id.***, ¶49. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of [the officer's] experience." ***Terry***, 392 U.S. at 27.

B. Facts

¶13 We now expand on the above summary of undisputed facts found by the circuit court and taken from Officer Rossman's testimony at the suppression hearing, as well as from two exhibits received at the hearing: a squad video (shown at the hearing) and the officer's police report.

¶14 Officer Rossman, a police officer with eight years of experience, was patrolling at approximately 1:00 a.m. when he heard loud engine-revving noises and observed three motorcyclists outside a bar, revving their engines and spinning their tires, creating a smelly smoke cloud. He followed the three motorcyclists as they left the bar and stopped one of the motorcyclists because the motorcycle's registration plate was "flipped vertically making it difficult to read" and "[t]here was no illumination on it."

¶15 The squad video, which is in the record on appeal, affords reasonably clear viewing and reflects at least some audible sounds from pertinent

events immediately before and during the stop.[4] As Officer Rossman follows the three motorcyclists along a city street and approaches an intersection at a traffic light, one of the motorcyclists turns left and two turn right. Of the two who turn right, one continues ahead down the road, and the second motorcyclist, with the squad car behind him, turns onto a side street and pulls over in a well-lit area. This second motorcyclist is later identified as Eigner.

¶16 Eigner is dressed in a hooded sweatshirt and ordinary-looking jeans, and there appears to be nothing remarkable about his clothing. Immediately after pulling over, Eigner, in one fluid and unhurried motion, puts down the kickstand, steps off the motorcycle, and, standing next to the motorcycle, takes a wallet out of his pants pocket and removes a card-like item from the wallet. In the meantime, Officer Rossman leaves the squad car and approaches Eigner. As Officer Rossman approaches Eigner, Eigner turns toward him. Officer Rossman asks Eigner how he is doing and Eigner replies, "Good," handing Rossman the item that he pulled out of his wallet.

¶17 As the two men stand side by side, looking at each other and at the motorcycle, Rossman asks Eigner if he knows why the officer stopped him. Eigner's response is inaudible, but seemingly passive and non-confrontational. Rossman tells Eigner that he made the stop because of the "performance" with the

[4] Beyond finding that Eigner dismounted from his motorcycle after the stop, the circuit court did not make findings as to what took place from the time of the stop to the initiation of the pat-down. Neither party contests that this court has a vantage point equal to that of the circuit court in reviewing the video recording as part of our evaluation of the legal question as to whether the pat-down was supported by reasonable suspicion. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999) (when the only evidence on a factual question is reflected in a video recording, the court of appeals is in the same position as the circuit court to determine a question of law based on the recording).

tires at the bar. Eigner responds, in the same non-confrontational manner, that it was one of the other motorcyclists, and not he, who had been "burn[ing] tires" because, gesturing at his motorcycle, his motorcycle cannot "burn a tire." In response to further questioning, Eigner says that he does not know who the other motorcyclist who was burning tires is, beyond being "a guy at the bar." While the two men are talking, Eigner hands Rossman a second item that Eigner has taken out of his wallet.

¶18 Officer Rossman asks Eigner if he has any weapons on him and Eigner, again in the same passive, non-confrontational manner, says, "No, sir." This is the first reference that Rossman makes to the possibility of weapons during the entire encounter between the two men. It occurs approximately thirty-six seconds after Rossman first approaches Eigner.

¶19 Rossman then puts his hand on Eigner's back and, as he does so, he asks if Eigner minds if he pats Eigner down. Eigner's response is not clearly audible. Rossman proceeds to pat Eigner down.

¶20 Approximately fifty-two seconds elapse from the time that Eigner brings his motorcycle to a stop to the time that Rossman places a hand on Eigner's back to commence the pat-down. Rossman approaches Eigner approximately twelve seconds after Eigner stops and performs the pat-down approximately forty seconds after that. Throughout this process Eigner is, by all appearances, fully compliant and resigned to a cooperative encounter with the officer. He exhibits no apparent signs of aggression, hostility, or nervousness at any point up to the moment the pat-down commences, or, for that matter, thereafter.

¶21 During his testimony at the hearing, Officer Rossman agreed that the video shows that, immediately after Eigner pulled over, Eigner "lifted his leg over

the motorcycle, got off, and stood there." However, Rossman testified that in his experience it is not "typical behavior" for a person to dismount from a motorcycle after a motorcycle is stopped. Rossman testified that the fact that Eigner dismounted was concerning: "At the point when somebody dismounts from a motorcycle, I don't know what their intentions are, there's no barrier between him and I, and, and it could put me in danger.... I don't know if they're going to flee, I don't know if they're going to attack me, for safety reasons."

¶22 Officer Rossman also testified that, at a training session he had attended regarding the Outlaw motorcycle gang, he had learned that most if not all Outlaw gang members applied for concealed carry permits and were likely carrying weapons. However, Rossman also testified that he had no reason to believe that Eigner was a member of the Outlaw gang.

C. No reasonable suspicion that Eigner was armed and dangerous

¶23 As a preliminary matter, the State argues that we need not reach the question of whether the pat-down was supported by reasonable suspicion because Eigner consented to the pat-down. Specifically, the State argues that "the officer merely effectuated the pat-down *after* Eigner gave consent to it" through words and gestures. We reject the State's only consent-based argument at a minimum because it is based on an inaccurate view of the facts.

¶24 The circuit court found that the officer was already making "motions to effectuate the pat[-]down" when he first asked for Eigner's consent, and this finding is supported by the video. The State does not argue that this could have constituted valid consent, regardless of how Eigner in fact responded to the request. For at least this reason, we reject the only consent-based argument that

the State makes, and turn to whether the pat-down was supported by reasonable suspicion.

¶25 We conclude that, under the totality of circumstances, *see* ***Kyles***, 269 Wis. 2d 1, ¶49, there were no specific and articulable facts providing a reasonable basis for the pat-down. The stop was for a registration plate violation and took place on a city street in a well-lit area. We have already summarized in detail the manner in which Eigner calmly and normally dismounted, stood next to his motorcycle, and by all appearances fully submitted to the officer's authority, even helpfully anticipating requests that he expected the officer to make. Not only were there no furtive, nervous, or suspicious movements, but Eigner stood patiently next to his motorcycle. While not dispositive, it is significant that the officer engaged in discussion with Eigner, while in close physical proximity, for thirty-six seconds before first raising the topic of whether Eigner might be armed. Officer Rossman testified, and the video shows, that Eigner did not appear to cover or conceal anything as he stopped or thereafter, that he did not avoid eye contact with Rossman during the stop, and that nothing about Eigner's conduct or appearance suggested that he had a weapon on his person.

¶26 Rossman testified that it is "concerning" when someone "jumps" off their motorcycle, but he acknowledged that Eigner did not literally jump off the motorcycle. Rather, Eigner "lifted his leg over the motorcycle, got off, and stood there." Rossman did not testify that anything about the way in which Eigner dismounted caused concern, such as a dismount in an unusually energetic, furtive, or seemingly aggressive way. Nor did Rossman testify that anything else *that Eigner did* gave him cause for concern. In short, nothing in the video or testimony presented at the hearing suggests that Eigner acted aggressively or furtively or in

any way other than in an ordinary, acquiescent, and non-threatening manner from the time that he pulled over to the time that Rossman initiated the pat-down.

¶27 In addition, there was apparently nothing about Eigner's clothing and there were no markings on, or features of, his motorcycle that might have reasonably added to a concern about weapons possession, including nothing suggesting membership in the Outlaws or another motorcycle gang or club.

¶28 The State argues that other facts justified the pat-down. The first set of facts relates to an alleged connection with the Outlaw motorcycle gang. Specifically, the State argues that Officer Rossman had "a sufficient articulable basis upon which to reasonably suspect that Eigner was a member of a motorcycle gang whose members are frequently armed." The State bases this argument on the following facts: Eigner was with two other motorcyclists, one or more of whom had been revving engines and spinning tires; the two other motorcyclists drove away; Rossman had learned that most Outlaw motorcycle gang members are likely armed; and Rossman had pulled over other motorcyclists who were armed. The State's argument fails on several levels.

¶29 The proposition that anyone who rides a motorcycle in a group is likely to be a member of the Outlaws and, therefore, armed and dangerous, is entitled to little or no weight. The State does not direct us to any specific facts that would have made it reasonable for the officer to infer that Eigner was a member of the Outlaws and, therefore, armed and dangerous.

¶30 The State suggests that the officer could reasonably have suspected that Eigner was armed and dangerous in part because the two other motorcyclists left and the officer could have had a reasonable fear that they might return. We reject this argument for at least two reasons. First, the argument rests on a flawed

view of the facts. The State asserts that "when Eigner was stopped, the other motorcyclists drove away." However, that is a misleading summary of what the video shows. Rather, both motorcyclists drove away *before* Eigner was stopped, *separately*, at two *different* times, in two *opposite* directions. The State does not explain how these facts support more than a mild inference that these two other motorcyclists would return to where Eigner and Rossman were. It seems much more likely, given all of the facts presented to the circuit court, that they were gone with the wind. Second, the State fails to explain how the possible return of the other motorcyclists would have made it more likely that Eigner himself was armed and dangerous.

¶31 As we stated in ***State v. Gordon***, 2014 WI App 44, ¶12, 353 Wis. 2d 468, 846 N.W.2d 483, "circumstances must not be so general that they risk sweeping into valid law-enforcement concerns persons on whom the requisite individualized suspicion has not focused." In ***Gordon***, we concluded that permitting a protective pat-down of a person who patted the outside of his pants pocket in a high-crime area after seeing a police car, "would expand the individualized 'reasonable suspicion' requirement so far so as to negate it." ***Id.***, ¶18. Here, we have neither a patting of the pants nor a high-crime area. It is difficult for us to see how we could affirm, given the result in ***Gordon***. We agree with Eigner that to permit a protective frisk of a motorcyclist solely because he or she had been in the company of two other motorcyclists, after some spinning of tires outside a bar late at night, casts too wide a net.

¶32 The second set of facts that the State argues supported the pat-down relates to Eigner's decision to dismount after braking to a stop. Specifically, the State argues that Officer Rossman "reasonably feared for his safety, because Eigner immediately dismounted his motorcycle, which was highly unusual and left

Officer Rossman unprotected and exposed to possible danger." While there are the very best of reasons for officers to be safety-conscious every time they make a traffic stop and come face-to-face with one or more persons in the stopped vehicle, the record provides no support for this argument related to the dismount under the totality of circumstances here. *See* ***Kyles***, 269 Wis. 2d 1, ¶49.

¶33 The State's first argument related to the dismount pertains to the fact of the dismount itself. However, as we have already explained, the State points to no facts that either show or raise a reasonable inference that Eigner did anything other than dismount in a calm, normal, non-threatening manner. As to the officer's testimony that it was unusual for Eigner to dismount after braking to a stop, it is difficult to see what weight could reasonably be given to this as supporting a suspicion that Eigner was armed and dangerous. The officer did not testify, and the State does not argue, that there is a basis to suspect a correlation between the allegedly "unusual" behavior of making a calm, normal, non-threatening dismount of a motorcycle following a traffic stop and being armed and dangerous. If the alleged abnormality of a calm, normal, non-threatening dismount could be called a fact in support of suspicion, it would be of only the most minimal weight under the circumstances here. *See* ***Gordon***, 353 Wis. 2d 468, ¶13 ("there must be other circumstances that prime [the] trigger" for reasonable suspicion).

¶34 The State clearly exaggerates in calling the dismount here "inexplicable." As Eigner points out, one does not have to be a motorcyclist to readily understand that fully complying with an officer during a traffic stop, including fishing for a driver's license and proof of insurance, might well require dismounting from the motorcycle, or at least make a prompt dismount a highly attractive option for many motorcyclists.

¶35 The State's reliance on ***State v. Sumner***, 2008 WI 94, 312 Wis. 2d 292, 752 N.W.2d 783, is misplaced. In that case, the court upheld a pat-down where the person stopped had made unexplained, furtive, reaching gestures before exiting his vehicle, was unusually and visibly nervous, and repeatedly put his hands in his pockets after being ordered not to. ***Id.***, ¶¶24, 36, 38, 40, 44. Indeed, the discussion in ***Sumner*** only supports our conclusion, since it depends on such starkly different facts from those presented here.

¶36 The State cites the court's quotation in ***Sumner*** of a passage from a treatise noting that reasonable suspicion can arise from "awkward movements." Not only does the State fail to identify any "awkward movements" here, but the full quotation refers to "awkward movements manifesting an apparent effort to conceal something under his jacket." ***Id.***, ¶39 n.20. There is no evidence that Eigner made any awkward movement in an apparent attempt to conceal anything.

¶37 The State's second argument related to the dismount is that, after the dismount, "the motorcycle was no longer a barrier between Eigner and Officer Rossman, thereby putting Officer Rossman in danger." However, the State fails to explain how the lack of a barrier between the officer and Eigner supported the inference that Eigner was armed and dangerous. As far as we can discern, there is no limit to the State's argument, which is in effect that any time an officer is face-to-face with someone the officer has encountered in an official capacity, where there is "no barrier," there are reasonable grounds for a pat-down. This is not what the case law instructs us is reasonable under the Fourth Amendment.

¶38 Finally, the State argues that we should give weight to the fact that Officer Rossman was alone with Eigner at the time of the pat-down. As part of this argument, the State refers to the concept, addressed above, that the officer

could reasonably have worried that the two other motorcyclists might return at any time. However, the State fails to direct us to authority that comes close to resembling the facts in this traffic stop case, merely citing one case that is thoroughly distinguishable from the facts here. *See* ***State v. Limon***, 2008 WI App 77, ¶34, 312 Wis. 2d 174, 751 N.W.2d 877 (officers investigating tip of drug dealing and "drug loitering activities" at specific location in high crime area, who observed evidence of drug possession or dealing, were justified in searching a purse without a warrant or consent pursuant to WIS. STAT. § 968.25 in part because they were "outnumbered and without backup"). Assuming without deciding that the "outnumbered" concept referred to in ***Limon*** could apply to the facts here, it would count for little. The officer here was not outnumbered, and the possibility that the two other motorcyclists who had turned off before the stop, at separate times and in opposite directions, might return and threaten harm to the officer was highly remote.

¶39 It is the same with the State's reliance on ***State v. Bridges***, 2009 WI App 66, 319 Wis. 2d 217, 767 N.W.2d 593. In that case, we upheld a protective pat-down following a traffic stop in a poorly lit, deserted area where gunfire was frequently heard at night, and the person had made furtive movements consistent with concealing a weapon and did not respond to the officer's questioning him about the suspicious movement. ***Id.***, ¶¶17-18, 21. Here, the traffic stop was in a well-lit area within the City of La Crosse, and Eigner neither made any furtive movements nor failed to respond to the officer's questions. Nothing in ***Bridges*** helps the State here.

¶40 In sum, we conclude that there was no consent, and that under the totality of circumstances the officer lacked the requisite specific and articulable facts to justify the pat-down of Eigner's person. Therefore, the circuit court erred

in denying Eigner's motion to suppress the evidence derived from the pat-down, on which the drug charges were based. Accordingly, we reverse the judgment of conviction for possession of methamphetamine.

II. Prosecutorial Vindictiveness

¶41 Eigner's claim of prosecutorial vindictiveness "rests on the basic principle that it is a violation of due process when the State retaliates against a person 'for exercising a protected statutory or constitutional right.'" ***State v. Cameron***, 2012 WI App 93, ¶10, 344 Wis. 2d 101, 820 N.W.2d 433 (quoted source omitted). Specifically, Eigner argues that the State filed the bail jumping charges in retaliation against him for pursuing his suppression motion challenging the legality of the protective pat-down at the traffic stop. We reject this argument because Eigner fails to explain why we should not rely on the circuit court's finding that the prosecutor filed the new charges for the reasons she explained, which did not have a retaliatory purpose.

A. Legal principles and standard of review

¶42 Our supreme court laid out the general framework for analysis of a prosecutorial vindictiveness claim in ***State v. Johnson***, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846:

> In order to decide whether a prosecutor's decision to bring additional charges constituted prosecutorial vindictiveness in violation of the defendant's due process rights, we first must determine whether a realistic likelihood of vindictiveness exists; if indeed it does exist, then a rebuttable presumption of prosecutorial vindictiveness applies. If we conclude that no presumption of vindictiveness applies, we next must determine whether the defendant has established actual prosecutorial vindictiveness.

> The legal principles surrounding prosecutorial vindictiveness claims present questions of law that we review *de novo*. However, we review the lower court's finding of fact regarding whether the defendant established actual vindictiveness under the clearly erroneous standard.

Id., ¶¶17-18 (citations omitted).

¶43 If a presumption of vindictiveness is established, "the prosecutor may rebut it with an explanation of the objective circumstances that led the prosecutor to bring the additional charges." ***Id.***, ¶45. If no presumption of vindictiveness applies, then, in order to establish actual vindictiveness, a defendant must show "that the prosecutor's decision to add charges was actually motivated by a desire to retaliate against the defendant 'for doing something that the law plainly allowed him to do.'" ***Id.***, ¶47 (quoting ***U.S. v. Goodwin***, 457 U.S. 368, 384 (1982)).

B. Facts relevant to prosecutorial vindictiveness claim

¶44 Eigner's prosecutorial vindictiveness claim is based on a series of emails between his new counsel and the prosecutor, reproduced in relevant part below, together with the prosecutor's decision to file the bail jumping charges.

¶45 As stated above, the circuit court ordered briefing at the conclusion of the hearing on Eigner's motion to suppress. Before the parties filed their briefs, Eigner's counsel withdrew from representing Eigner and new counsel was appointed to represent Eigner.

¶46 On the same day that Eigner's new counsel was appointed, the new counsel emailed the prosecutor asking about the status of the suppression motion filed by Eigner's original counsel in the drug case. In response, the prosecutor emailed as follows:

> This one makes me SO MAD!!
>
> [Eigner's original counsel] filed a crap suppression motion. Honestly, just a $$ generator. We had the hearing. Showed the squad video (which depicted everything) at the hearing, officer there, etc....
>
> I don't know how you're supposed to generate a brief based on a hearing you weren't at. This whole thing isn't fair to Eigner, who has generally been pretty decent to deal with. But also not fair to anyone else. And it makes me mad.
>
> So that's where things are. I will re-offer the original offer even though it was contingent, as always, on not making me jump through hoops and such—I won't punish [Eigner] for [original counsel's] behavior.

¶47 Eigner's new counsel filed a brief in support of the suppression motion pursuant to the circuit court's scheduling order, after which the prosecutor emailed counsel:

> You told Judge Horne that you hoped we'd have a resolution prior to the oral ruling date. Frankly, if I have to write another brief, I might as well just go through trial because it's a pretty clear case if I win the suppression motion, and I'll probably charge the [felony bail jumping charges] too, just to make it worth my while if I have to write [the brief]. If he wants to negotiate, let me know ASAP.

¶48 In response, Eigner's new counsel emailed that he believed the suppression motion had merit and was important to litigate, even though "I know that you're trying to do the right thing for [Eigner], and I appreciate that."

¶49 The prosecutor timely filed the State's brief opposing the suppression motion. Shortly thereafter, the prosecutor filed the complaint in a separate case, charging Eigner with three counts of felony bail jumping for missing three drug tests that were required by his bond conditions in the drug case.

¶50 At the hearing on Eigner's motion to dismiss the bail jumping charges, the prosecutor made an offer of proof that her intent in filing the bail jumping charges was to help Eigner get on supervision so that he could receive "resources" for his drug addiction, particularly in light of his telling the officer at the traffic stop that he needed help. As to why Eigner's original attorney's filing of the suppression motion made her "so mad," the prosecutor stated:

> [I]t irked me that Mr. Eigner went from being somebody who is saying I need help, please help me, to taking what I [believed] to be the unhelpful advice of his former attorney, who was making money off putting off Mr. Eigner getting into treatment.
>
> I'm not mad that I have to do suppression hearings, I do them all the time, but my goal in this entire case was to get Mr. Eigner the treatment that I thought he wanted....
>
> But my actions and my comments to [Eigner's new attorney] came from a place of wanting to help his client. I think it would have been vindictive if he would have filed a motion, and then I would have slapped down some bailjumping charges without a warning, but I didn't see anything [in my emails] more than what we do for a waiver of preliminary hearing.

¶51 The prosecutor further explained:

> So we make offers for waiver of prelim[inary examination]. If they don't waive the prelim, the offer is rejected. Here, I said hey, we have got all these things we can charge, but if he wants to resolve the case and get the help he needs, and not continue to try to and contest the charges, then I won't file these [bail jumping charges] that legitimately, in my opinion, they could have been charged. It's no different than reading in charged conduct in other cases.

¶52 The prosecutor stated that she believed that, even if the State lost the suppression motion and as a result the drug case was dismissed, by charging the missed drug tests as bail jumping she could help get Eigner into treatment as part of the resolution of the bail jumping case.

¶53 Consistent with the prosecutor's statements, the circuit court found that the prosecutor's subjective motivation in filing the bail jumping charges was that she wanted to allow Eigner to move forward with the rehabilitation that she believed he sought, and that she took this step as part of plea negotiations so as to resolve the pending cases "in the way that helps Mr. Eigner." Based on the emails and the prosecutor's offer of proof, the court found that the prosecutor did not act with "retaliatory purpose" and denied the motion to dismiss.

C. Presumption of vindictiveness

¶54 As stated above, in order to establish that a presumption of prosecutorial vindictiveness applies, we must determine "whether a realistic likelihood of vindictiveness exists." ***Johnson***, 232 Wis. 2d 679, ¶17. Eigner argues that the emails—which on their face explicitly tie the prosecutor's frustration with Eigner's pursuit of the suppression motion to the decision of whether to file the new felony bail jumping charges—together with the subsequent filing of the new charges, establish "a realistic likelihood of vindictiveness," carrying with it the presumption of vindictiveness.

¶55 The State argues that there can be no presumption of vindictiveness here, because the emails and filing of the new charges occurred in the midst of plea negotiations, and, as we have stated, "It is well established that the filing of additional charges during the give-and-take of pretrial plea negotiations does not warrant a presumption of vindictiveness." ***Cameron***, 344 Wis. 2d 101, ¶13.

¶56 If the presumption of vindictiveness applied here, then we would proceed to review whether the prosecutor rebutted the presumption "with an explanation of the objective circumstances that led the prosecutor to bring the [bail jumping] charges." ***Johnson***, 232 Wis. 2d 679, ¶45. If no presumption of

vindictiveness applied here, then we would proceed to review whether Eigner established actual vindictiveness. ***Id.***, ¶47.

¶57 We need not and do not decide whether the presumption of vindictiveness applies here, because the circuit court's finding that the prosecutor acted to facilitate Eigner's rehabilitation and not for a retaliatory purpose is not clearly erroneous. *See* ***State v. Edwardsen***, 146 Wis. 2d 198, 205-07, 430 N.W.2d 604 (Ct. App. 1988) (concluding that "the prosecutor here made an adequate showing of his legitimate concerns regarding appropriate punishment sufficient to overcome the presumption of vindictiveness"); ***Johnson***, 232 Wis. 2d 697, ¶47 ("the lower court's finding of fact regarding whether the defendant established actual vindictiveness is reviewed under the clearly erroneous standard"). Therefore, we assume without deciding that the presumption applies, and proceed directly to our conclusions about the State's ability to rebut the presumption.

D. Prosecutor's explanation rebutting presumption and defeating claim of actual vindictiveness

¶58 It is undisputed that the prosecutor explained the circumstances that led her to file the bail jumping charges, namely to ensure that there would be a vehicle by which Eigner would have access to drug treatment resources that she believed he sought, regardless of the outcome of his suppression motion. Eigner argues that the prosecutor's explanation is "less compelling" than the statements made in her emails before the new charges were filed. However, Eigner fails to explain why we should upset the circuit court's finding that the prosecutor filed the new charges for the reasons she explained.

¶59 As stated, the prosecutor represented to the circuit court, and the circuit court found, that the prosecutor was prompted not by the intent to retaliate

against Eigner for pursuing the suppression motion, but to get Eigner into treatment she believed that he sought in order to help his rehabilitation as soon as possible, regardless of the outcome of the suppression motion. The court also found that the prosecutor sought to advance that purpose by trying to speed the give and take of pretrial negotiations.

¶60 Eigner argues that the prosecutor's claim that the objective was to see that Eigner got treatment "does not mesh with the timing of the new charges," in that the need for additional charges would arise only if the suppression motion was granted, but the prosecutor filed the new charges before the motion was resolved. However, the circuit court found that the prosecutor sought to come up with a resolution regardless of the outcome of the suppression motion, "for negotiation reasons." The court found that the prosecutor in the email was "definitely saying, hey, listen, let's negotiate this as soon as possible. Otherwise, I'm going to charge him with felony bailjumping," and "that's what she was trying to do" to achieve "other goals" than punishing Eigner. Eigner fails to show that these findings are clearly erroneous.

¶61 In urging us to reject the prosecutor's explanation, Eigner is effectively challenging the circuit court's determinations of credibility and weight, which we do not disturb on appeal. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987) ("The credibility of witnesses and weight to be given their testimony are matters for the [circuit] court to decide.").

¶62 In sum, assuming without deciding that the presumption of vindictiveness applies here, Eigner fails to show that the circuit court clearly erred in finding that the prosecutor rebutted the presumption by explaining adequate

objective circumstances that led her to bring the bail jumping charges, which defeats Eigner's claim of actual prosecutorial vindictiveness.

CONCLUSION

¶63 For the reasons stated, we conclude that the circuit court erroneously denied Eigner's motion to suppress evidence in the drug case. Accordingly, we reverse the judgment of conviction for possession of methamphetamine. Separately, we conclude that the circuit court properly denied Eigner's motion to dismiss the charges in the bail jumping case. Accordingly, we affirm the judgment of conviction for bail jumping.

By the Court.—Judgment reversed; judgment affirmed.

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