COURT OF APPEALS DECISION DATED AND FILED

July 6, 2005

Cornelia G. Clark
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. 2004AP2987-CR

Cir. Ct. No. 2004CM113

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MALCOLM J. MULLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed.*

¶1 SNYDER, J.[1] Malcolm J. Muller appeals from a judgment of conviction for possession of tetrahydrocannabinols (THC or marijuana), contrary to WIS. STAT. § 961.41(3g)(e), and carrying a concealed weapon, contrary to WIS. STAT. § 941.23. Muller contends that the search of his vehicle violated his Fourth Amendment right to be free from unreasonable search and seizure and that all evidence obtained in that search should have been suppressed. We agree and reverse.

FACTS

¶2 On February 22, 2004, Muller, Ruth Navarro, and Carol Cooper were involved in a minor traffic accident in the Village of Walworth. Muller advised Navarro and Cooper that he was late picking up his father from the train station, he was concerned about his father standing out in the rain, and he wanted to exchange information without police involvement. Navarro and Cooper were concerned that Muller would not report the accident or exchange information. Thus, Navarro flagged Officer Brian J. Lantz to the scene.

¶3 As Lantz explained the accident report process, Muller became belligerent. He turned to Cooper and Navarro and, using profanity, asked why they wanted the police when the vehicles were not damaged. Having investigated many automobile collisions and considering that neither vehicle was damaged, Lantz believed that Muller was unreasonably angry and upset. When Lantz ran a check on Muller's driver's license, he determined that the license was valid and there were no outstanding warrants.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Muller explained to Lantz that he was late picking up his father from the train station and that his father might be standing out in the rain. Muller did not respond to Lantz's attempts to calm him and seemed eager to leave the scene. Lantz asked if he could pat Muller down. Muller responded that Lantz could and that he had two pocketknives on his person. Lantz found the pocketknives and judged them to be legal.

¶5 Lantz then requested permission to search Muller's vehicle. Muller responded that he would not give Lantz permission to search the vehicle, but he would not stop Lantz from searching the vehicle. Lantz again asked Muller for permission to search the vehicle; and again, Muller stated that he refused to give Lantz permission to search, but he would not prevent Lantz from searching it. Nevertheless, Lantz began searching the vehicle without Muller's consent or interference.

¶6 Muller went up to the vehicle at some point during Lantz's search. At that time, according to Lantz, Muller gave Lantz permission to search the vehicle's console. According to Muller, he did not give Lantz permission to search the console, but Lantz asked him how to open the console. The circuit court accepted that Muller initially refused to let Lantz search the console, but then said, "[G]o ahead."

¶7 Upon opening the console, Lantz noticed the barrel of a gun. Lantz then drew his own gun, told Muller not to move, and called for backup assistance. After arresting Muller, Lantz searched the vehicle again. At that time, Lantz discovered a switchblade knife, ammunition for the handgun, a hunting knife, and marijuana cigarettes.

¶8 The State charged Muller with possession of THC, contrary to WIS. STAT. § 961.41(3g)(e); two counts of carrying a concealed weapon, contrary to WIS. STAT. § 941.23; and possession of a switchblade knife, contrary to WIS. STAT. § 941.24(1). Muller moved to suppress all evidence obtained from the search of the vehicle. The circuit court denied Muller's motion, and Muller subsequently entered into a plea agreement. He pled no contest to possession of THC as an ordinance offense and to the concealed weapon charge regarding the handgun. The remaining charges were dismissed and read in at sentencing.

DISCUSSION

¶9 Muller presents two issues for our review: (1) whether, considering his refusals, Lantz's search of the vehicle was constitutional; and (2) whether Lantz's search of the console was constitutional.

¶10 When reviewing the denial of a motion to suppress evidence, appellate courts employ a two-step process. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. First, the appellate court will uphold the circuit court's findings of evidentiary and/or historical fact unless they are clearly erroneous. ***Id***. Second, the appellate court will review findings of constitutional fact de novo. ***Id***.

¶11 The Fourth Amendment prohibits warrantless searches of vehicles, except in limited circumstances. *See* U.S. CONST. amend. IV. Consent is a recognized exception to the warrant requirement. ***State v. Douglas***, 123 Wis. 2d 13, 18, 365 N.W.2d 580 (1985). To assert the consent exception, the State must prove that the search resulted from "free, intelligent, *unequivocal* and specific consent without any duress or coercion, actual or implied." ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993) (citation omitted;

emphasis added). Consent does not have to be verbal; consent can be implied through gestures and conduct. ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). Mere acquiescence, however, is not consent. ***Johnson***, 177 Wis. 2d at 234.

¶12 The State concedes the circuit court's finding that Muller equivocally consented, if at all, to the search of the vehicle. Our review of the record supports the circuit court's finding as well. Consent to a warrantless search must be unequivocal in order for the search to be permitted under the Fourth Amendment. ***Id***. at 233. We conclude that Lantz's warrantless search of Muller's vehicle, without Muller's unequivocal consent, violated the Fourth Amendment.

¶13 Muller contends that the search of his vehicle's console was likewise tainted by Lantz's unconstitutional search. We agree. The scope of a vehicle's search includes the console. *See* ***State v. Sherry***, 2004 WI App 207, 277 Wis. 2d 194, 690 N.W.2d 435 (lawful warrantless stop and search of vehicle), *review denied*, 2005 WI 1, 277 Wis. 2d 151, 691 N.W.2d 354 (No. 2003AP1531-CR); ***State v. Jones***, 142 Wis. 2d 570, 575, 419 N.W.2d 263 (Ct. App. 1987) (probable cause to search a vehicle justifies the search of every part of the vehicle and its contents that may conceal the object of the search); ***State v. Prober***, 98 Wis. 2d 345, 353-54 & n.6, 297 N.W.2d 1 (1980) (lawful inventory searches of vehicles include the vehicle's console), *overruled on other grounds by* ***State v. Weide***, 155 Wis. 2d 537, 455 N.W.2d 899 (1990); ***State v. S & S Meats, Inc.***, 92 Wis. 2d 64, 66, 284 N.W.2d 712 (Ct. App. 1979) (lawful warrant for search of vehicle included search of vehicle's console). Thus, logic permits the inference that illegal vehicle searches encompass the console.

¶14 The State responds that Muller consented to the search of the console and that consent attenuates the search of the console from Lantz's illegal search of the vehicle. If consent occurs after the initial unlawful entry, that consent is invalid unless the connection between the unlawful entry and the subsequent consent has been so attenuated as to dissipate the taint. *See* ***State v. Bermudez***, 221 Wis. 2d 338, 352, 585 N.W.2d 628 (Ct. App. 1998). Courts balance three factors when determining whether an illegality is sufficiently attenuated from the suspect's consent. Those factors are: "(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." ***Phillips***, 218 Wis. 2d at 205. The State has the burden to show that there was "a sufficient break in the causal chain between the illegality and the seizure of evidence." ***Id***. at 204-05.

¶15 The State acknowledges that only minutes passed between the illegal entry of Muller's vehicle and the search of the console. Nonetheless, the State cites ***Phillips*** for support and emphasizes that Lantz's search of the console was "non-threatening" and "non-custodial." *See* ***id***. at 207. The State also argues that Lantz concluded his initial search of the vehicle and then asked Muller for permission to search the console. The State posits that this intervening event "changed the dynamics of the situation and in itself served to break the causal link between the illegal entry and the discovery of evidence." We are not persuaded.

¶16 Muller twice refused to give Lantz permission to search the vehicle. Only minutes passed between Muller's refusals and the search of the console. Lantz failed to advise Muller that he could refuse consent to the console search. We ascertain no intervening event sufficient to break the causal chain between the illegal search and the evidence obtained by Lantz.

CONCLUSION

¶17 We conclude that Lantz's warrantless search of Muller's vehicle, without Muller's unequivocal consent, violated the Fourth Amendment. Furthermore, the search of a vehicle includes the search of the console, and, therefore, Lantz's search of the console of Muller's vehicle was tainted by the original illegal act. Finally, we hold that any consent from Muller to search the console was invalid; no intervening event attenuated the illegal vehicle search from the console search. Hence, we reverse.

By the Court.—Judgment and order reversed.

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