COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP2189-CR **Cir. Ct. No. 2015CF122**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHON J. OLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jonathon Olson appeals a judgment convicting him of possession with intent to deliver up to 200 grams of tetrahydrocannabinols (THC). Olson argues the circuit court erred by denying his suppression motion because: (1) police lacked reasonable suspicion to detain Olson past the time

required to investigate a traffic accident; and (2) police impermissibly searched Olson's backpack without a warrant.

¶2 We conclude police had reasonable suspicion to detain Olson beyond the time required to investigate the accident. However, we agree with Olson that a warrant was required in order for police to search his backpack. We reject the State's argument that Olson is not entitled to suppression because police would have inevitably discovered the evidence inside the backpack absent the constitutional violation. We therefore reverse Olson's judgment of conviction and remand with directions that the circuit court suppress the evidence found in Olson's backpack.

BACKGROUND

¶3 The following facts are taken from the suppression hearing testimony of Rhinelander police officer Chad Brown and are undisputed for purposes of this appeal.

¶4 On April 1, 2015, Brown responded to the scene of a two-car accident in which Olson was one of the drivers. When Brown arrived, both drivers had moved their vehicles off of the road and into nearby parking lots—Olson's vehicle was in a law office parking lot, and the other vehicle was in a gas station parking lot across the street. While Brown was gathering information at the gas station, he was "approached by a gentleman that was doing roof work" at the law office. The man advised Brown "that Mr. Olson had thrown a bag in the bushes from his vehicle prior to [Brown's] arrival."

¶5 After receiving this information, Brown "continued with the accident investigation, gathered all the information that [he] needed, and … explained to

both drivers the process of the accident report and what was going to be happening next." Brown then told the other driver he was free to leave and "walked across the street with Mr. Olson to view his vehicle and gather just a little more information from him." After Brown and Olson reached the law firm parking lot where Olson's vehicle was parked, Brown "completed getting the information [he] needed from Mr. Olson for [the] accident report, viewed his vehicle, viewed the damage, [and] finished up telling him what was going to happen with the accident report."

¶6 At that point, Brown asked Olson "what item he threw in the bushes." Olson initially denied throwing anything in the bushes, but when Brown asserted he knew Olson had thrown something in the bushes and again asked what it was, Olson told Brown "it was his backpack—quote 'my backpack.'" Brown then asked Olson what was in the backpack that Olson did not want Brown to see, and Olson responded, "[A] bag of weed," which Brown understood to mean marijuana.

¶7 At Brown's request, Olson then retrieved the backpack from the bushes and handed it to Brown. Brown estimated the bushes in question were about forty feet from where he was speaking to Olson. After receiving the backpack from Olson, Brown opened it and discovered "several quart size baggies of marijuana." Brown then handcuffed and arrested Olson.

¶8 As noted above, Olson moved to suppress, arguing Brown lacked reasonable suspicion to detain him beyond the time required to investigate the accident and impermissibly searched his backpack without a warrant. The circuit court denied Olson's motion, and Olson subsequently pled no contest to possession with intent to deliver up to 200 grams of THC. Olson now appeals,

pursuant to WIS. STAT. § 971.31(10) (2015-16),[1] arguing the circuit court erred by denying his suppression motion.

DISCUSSION

¶9 Our review of an order denying a motion to suppress presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** However, the application of the law to those facts is a question of law that we review independently. ***Id.***

I. Reasonable suspicion

¶10 It is undisputed, for purposes of this appeal, that Olson was seized during the course of Brown's accident investigation and that Brown completed that investigation before asking Olson what he threw in the bushes. The disputed issue is whether, in asking Olson what he threw in the bushes, Brown impermissibly extended the investigative stop beyond the time required to investigate the accident.

¶11 A law enforcement officer may continue an investigative stop to investigate matters unrelated to the purpose of the stop if he or she "becomes aware of additional suspicious circumstances that give rise to a reasonable suspicion that the driver has committed or is committing an offense distinct from that prompting the initial stop." ***State v. Bons***, 2007 WI App 124, ¶13, 301 Wis. 2d 227, 731 N.W.2d 367. "The question of what constitutes reasonable

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. ***Id.*** at 423-24.

¶12 An officer is not required to rule out the possibility of innocent behavior before initiating—or, in this case, extending—an investigative stop. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). "Suspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). However, an officer's "inchoate and unparticularized suspicion or hunch" is insufficient to give rise to reasonable suspicion. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634).

¶13 The State argues the roofer's tip—i.e., that Olson threw a bag from his vehicle into the bushes before Brown arrived—provided a sufficient basis for Brown to extend the investigative stop to ask Olson what he threw in the bushes. The State contends the tip gave rise to a reasonable inference that Olson hid his bag so that police would not find it when they responded to the traffic accident. Based on that inference, the State argues Brown could reasonably suspect that Olson was involved in criminal activity.

¶14 In response, Olson observes that, when reasonable suspicion is alleged to be based on information from an informant, we must balance two factors to determine whether an officer acted reasonably in reliance on that

information. *See* ***State v. Miller***, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349. First, we consider "the quality of the information, which depends upon the reliability of the source." ***Id.*** Second, we consider the "quantity or content of the information." ***Id.***

¶15 "There is an inversely proportional relationship between the quality and the quantity of information required to reach the threshold of reasonable suspicion." ***Id.*** If an informant is more reliable, "there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information to conduct an investigatory stop." ***Id.***, ¶32. Conversely, if an informant has limited reliability—for instance, if he or she is entirely anonymous—the tip "must contain more significant details or future predictions along with police corroboration." ***Id.***

¶16 The tip at issue in this case had a high degree of reliability because the roofer identified himself to Brown using both his first and last names. He was therefore a citizen informant, rather than an anonymous informant. *See* ***State v. Powers***, 2004 WI App 143, ¶9, 275 Wis. 2d 456, 685 N.W.2d 869. Compared to an anonymous tip, information from an identified source has increased reliability because a known individual who provides false information to police could be arrested for doing so. *See* ***State v. Rutzinski***, 2001 WI 22, ¶20, 241 Wis. 2d 729, 623 N.W.2d 516; *see also* WIS. STAT. § 946.41. Wisconsin courts view citizen informants "as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established." ***State v. Williams***, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106.

¶17 Olson concedes that the roofer was a "citizen informant" and that his lack of anonymity "counts in favor of reliability." However, Olson contends the

roofer's tip was not reliable because, according to Brown's suppression hearing testimony, the roofer did not expressly state he had personally witnessed Olson throwing the bag into the bushes. Rather, Brown testified the roofer "advised [Brown] that Mr. Olson had thrown a bag in the bushes from his vehicle prior to [Brown's] arrival." Based on Brown's testimony, Olson suggests it is possible the roofer did not personally witness that act and was instead relying on "an observation from a co-worker." Consequently, Olson asserts there is no evidence as to the basis of the roofer's knowledge.

¶18 This argument is unpersuasive. Olson cites no authority for the proposition that an informant's report cannot be considered reliable unless the informant expressly stated he or she witnessed the events described to police. Notably, in ***Powers***, a drug store clerk called police to report that an intoxicated man (Powers) had come into the store and attempted to purchase a case of beer before driving away in a truck. ***Powers***, 275 Wis. 2d 456, ¶11. We stated these facts gave rise to a "reasonable inference" the clerk "had face-to-face contact with Powers and observed one or more indicia of intoxication," even though there was no express testimony the clerk had personally witnessed the events he described. ***Id.***

¶19 Similarly, in this case, it is reasonable to infer the roofer saw Olson throw his backpack into the bushes. Before Brown arrived at the accident scene, Olson had moved his vehicle off of the street and into the parking lot of the law office where the roofer was working. Brown described the bushes as being about forty feet away from the location in the law office parking lot where he spoke to Olson. These facts give rise to a reasonable inference that the roofer, while doing work on the law office roof, had a vantage point that allowed him to see Olson throw the backpack into the bushes. Moreover, there is no other logical

explanation as to how the roofer could have acquired that information, as there is no evidence in the record that there was anyone else nearby who could have observed Olson and relayed his or her observations to the roofer.

¶20 Olson's reliance on ***State v. Kolk***, 2006 WI App 261, 298 Wis. 2d 99, 726 N.W.2d 337, is also unpersuasive. In ***Kolk***, a citizen informant called police to report that Kolk was on his way to Milwaukee to pick up OxyContin. ***Id.***, ¶2. The informant later called back to report that Kolk "had already been to Milwaukee and had returned and would leave that afternoon for Madison." ***Id.***, ¶3. We concluded the informant's tip did not give rise to reasonable suspicion that Kolk was carrying drugs because the informant "did not demonstrate how he or she knew about the activities reported—a factor we believe the case law holds to be of utmost importance in considering a tip's reliability." ***Id.***, ¶1. Here, in contrast, the evidence gives rise to a reasonable inference that the roofer personally witnessed Olson throwing his backpack into the bushes.

¶21 Olson next argues the roofer's tip was unreliable because Brown "did not endeavor to corroborate" it. However, as noted above, if an informant is otherwise reliable, "there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information to conduct an investigatory stop." ***Miller***, 341 Wis. 2d 307, ¶32. The tip in this case had a high degree of reliability because the roofer provided his name to Brown and because of the reasonable inference that he personally witnessed the events he described. Under these circumstances, the lack of corroboration does not render the roofer's tip unreliable.

¶22 Olson also argues the "quantity" of the information provided by the roofer was "low." *See* ***id.***, ¶31. He stresses that the roofer did not "provide many

details or predict future activity." Again, though, where an informant's reliability is high, less detail is needed in order for police to rely on a tip. ***Id.***, ¶32.

¶23 Finally, Olson asserts the tip was deficient because the roofer did not actually allege Olson had engaged in "criminal activity." However, Olson does not cite any authority for the proposition that either the quality or quantity of a citizen informant's tip is lower when the informant reports activity that is merely suspicious, rather than criminal. To the contrary we have previously described a "citizen informant" as "someone who happens upon a crime *or suspicious activity* and reports it to police." ***Kolk***, 298 Wis. 2d 99, ¶12 (emphasis added).

¶24 For all of the foregoing reasons, we conclude Brown was entitled to rely on the information he received from the roofer. That information gave rise to a reasonable inference that Olson attempted to hide his backpack before police arrived at the accident scene in order to prevent them from finding it. That inference was sufficient to support a reasonable suspicion that Olson was engaged in criminal activity.[2]

[2] Olson argues the "desire to conceal personal items cannot be the basis for a Fourth Amendment search or seizure" because "any attempt to maintain privacy, such as by concealing items within a safe or securing electronic information behind a password, could be construed as an attempt to hide 'criminal activity.'" This argument is unavailing. Here, it was not merely the fact that Olson attempted to conceal his backpack that gave rise to reasonable suspicion. Rather, the timing and circumstances of the concealment—specifically, that it occurred shortly after a car accident, but before police arrived at the scene—reasonably suggested Olson was involved in criminal activity.

Olson also asserts in his reply brief that there is no evidence he knew at the time he concealed his backpack that police were on their way. However, we conclude Brown could reasonably infer, under the circumstances, that Olson believed police would be arriving soon when he threw his backpack into the bushes.

¶25 In his reply brief, Olson suggests there are other, innocent reasons he may have wanted to conceal his backpack. However, reasonable suspicion does not require an officer to rule out alternative, innocent explanations for otherwise suspicious activity. *See* ***Waldner***, 206 Wis. 2d at 59. Based on the roofer's tip, Brown could reasonably suspect Olson was engaged in criminal activity. That reasonable suspicion permitted Brown to extend the investigative stop in order to ask Olson what he threw in the bushes.

II. Warrantless search

¶26 Olson next argues that, even if Brown had reasonable suspicion to extend the investigative stop, suppression of the marijuana found in his backpack is nevertheless required because Brown impermissibly searched the backpack without a warrant. In response, the State asserts the Fourth Amendment's warrant requirement does not apply because Olson abandoned the backpack. In the alternative, the State argues suppression is not warranted because police would have inevitably discovered the marijuana inside the backpack absent any constitutional violations.

A. Abandonment

¶27 "[B]efore a defendant can invoke the protections of the Fourth Amendment, he or she must establish a legitimate expectation of privacy in the object searched." ***State v. Roberts***, 196 Wis. 2d 445, 453, 538 N.W.2d 825 (Ct. App. 1995). A defendant has no legitimate expectation of privacy in an item he or she has abandoned. ***Id.*** "In the fourth amendment context, the test for abandonment of property is distinct from the property law notion of abandonment; it is possible for a person to retain a property interest in an item but nonetheless to relinquish his or her reasonable expectation of privacy in the object." ***Id.*** at 454.

To determine whether a defendant retained a legitimate expectation of privacy in an object that is alleged to have been abandoned, we must consider both whether the defendant had a subjective expectation of privacy in the object and whether that expectation was objectively reasonable. ***Id.***

¶28 The State argues Olson abandoned his backpack by throwing it into the bushes on publicly accessible property. Assuming without deciding that Olson abandoned his backpack by throwing it into the bushes, we nevertheless conclude he had a legitimate expectation of privacy in the backpack because he reclaimed ownership of it before the challenged search. *See* ***United States v. Witten***, 649 F. App'x 880, 885 (11th Cir. 2016) (recognizing that, in abandonment cases, the question is whether the defendant had a reasonable expectation of privacy with regard to the searched property "*at the time of the search*" (quoting another source)). Brown testified that, after he completed his accident investigation, he asked Olson what item he had thrown in the bushes, and Olson denied throwing anything in the bushes. When Brown subsequently told Olson he knew Olson had thrown something in the bushes and asked what it was, Olson responded, "[M]y backpack." This response was an unambiguous claim of ownership over the backpack. Olson then retrieved the backpack from the bushes, thereby reclaiming physical possession of it. Having reclaimed ownership of his backpack, Olson again had a legitimate expectation of privacy in its contents.

¶29 In this regard, ***United States v. Burnette***, 698 F.2d 1038 (9th Cir. 1983), is instructive. In ***Burnette***, police believed three defendants were involved in a bank robbery. ***Id.*** at 1042-43. When an officer stopped one of the defendants, she spontaneously stated, "I just found this purse." ***Id.*** at 1043. However, when the officer asked for identification, the defendant reached into the side pocket of the purse and produced a traffic court summons. ***Id.*** When the officer asked for

photographic identification, the defendant stated her identification was in her wallet, which was in "her purse"—referring to the purse she had previously claimed to have "just found." ***Id.*** After the officer renewed his request for photographic identification, the defendant "stood, turned away from the officer, and once again began to open the purse." ***Id.*** Because the officer feared the defendant was about to produce a weapon, he moved around her to see what she was doing. ***Id.*** at 1043-44. He saw her take something small and black out of the purse and also noticed the purse was "stuffed" with money. ***Id.*** at 1044. At that point, the officer seized the purse and handcuffed the defendant. ***Id.***

¶30 On appeal, the Ninth Circuit concluded the district court erred by finding the defendant had abandoned her purse. ***Id.*** at 1047-48. The court acknowledged the defendant initially disclaimed ownership of the purse, but it stated her subsequent conduct "strongly indicated her intent to retain a 'reasonable expectation of privacy in the purse.'" ***Id.*** at 1048. The court cited the fact that the defendant referred to the purse as "my purse" at one point during her conversation with the officer. ***Id.***

¶31 As in ***Burnette***, Olson reclaimed ownership of his backpack by affirmatively asserting it belonged to him. The State attempts to distinguish ***Burnette*** by emphasizing that, in order to support its conclusion the defendant retained a reasonable expectation of privacy in the purse, the Ninth Circuit also relied on the defendant's efforts to conceal the purse's contents from the officer. However, the defendant's reference to "my purse" in ***Burnette*** occurred during a longer interaction with law enforcement than the one at issue in this case, and her statement of ownership was more ambiguous than Olson's. As Olson points out, the defendant's reference to "my purse" in ***Burnette*** could have arguably been construed as a slip of the tongue or a less-than-artful way of referring to the purse

she was holding. Under those circumstances, the Ninth Circuit relied on the context for the defendant's statement—i.e., her efforts to conceal the purse's contents—to clarify that she had in fact re-asserted her ownership. Here, there is no need to resort to context because Olson unambiguously asserted his ownership of the backpack. Moreover, unlike the defendant in ***Burnette***, Olson did not orally disclaim and then reclaim ownership. Although he initially denied throwing anything into the bushes, he never denied owning the backpack.

¶32 Because Olson reclaimed ownership of his backpack, he had a legitimate expectation of privacy in the backpack at the time Brown searched it. We therefore reject the State's argument that Brown did not need a warrant in order to search the backpack.

B. Inevitable discovery

¶33 "Exclusion is a judicial remedy that can apply when the government obtains evidence as a result of a constitutional violation." ***State v. Jackson***, 2016 WI 56, ¶46, 369 Wis. 2d 673, 882 N.W.2d 422. However, the exclusionary rule is not absolute. ***Id.*** Under the inevitable discovery exception to the exclusionary rule, evidence discovered due to a constitutional violation is nevertheless admissible if the State can prove, by a preponderance of the evidence, that it would have inevitably discovered the evidence in question using lawful means. ***Id.***, ¶¶56, 66.

¶34 Here, the State has failed to meet its burden to prove that it would have inevitably discovered the marijuana in Olson's backpack absent the unconstitutional warrantless search. The State argues:

> Had [the] two alleged Fourth Amendment violations [i.e., the extension of the investigative stop and the warrantless

> search] not occurred, Officer Brown would have allowed Olson to leave the scene right after Officer Brown completed his accident investigation. Officer Brown then would have recovered the backpack himself and searched it. The search would have been lawful because Olson would not have undone his abandonment.

This argument is purely speculative. There is no reason to think that, had Brown told Olson he was free to leave without questioning him about the backpack, Olson would not have simply recovered the backpack himself. "Proof of inevitable discovery turns upon demonstrated historical facts, not conjecture." ***Id.***, ¶72.

¶35 In addition, we have already concluded Brown had reasonable suspicion to extend the investigative stop in order to ask Olson what he threw in the bushes. Thus, we cannot simply assume for purposes of our inevitable discovery analysis that the questioning never occurred and, as a result, Olson never reclaimed ownership of the backpack. As Olson observes, the State does not develop any argument explaining how the marijuana inside the backpack would have been inevitably discovered after Olson reclaimed ownership. We will not abandon our neutrality to develop that argument for the State.[3] *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶36 Because the State has not met its burden to prove, by a preponderance of the evidence, that the marijuana inside Olson's backpack would

[3] Wisely, the State does not argue the marijuana would have been inevitably discovered solely because there was sufficient evidence to establish probable cause for a search warrant. "If the existence of probable cause for a warrant excused the failure to obtain a warrant, the protection afforded by the warrant requirement would be much diminished." ***State v. Pickens***, 2010 WI App 5, ¶49, 323 Wis. 2d 226, 779 N.W.2d 1 (2009).

have been inevitably discovered absent the warrantless search, the circuit court erred by denying Olson's suppression motion. We therefore reverse Olson's judgment of conviction and remand with directions that the circuit court suppress evidence of the marijuana found inside his backpack.

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. This opinion may not be cited except as provided under RULE 809.23(3).