COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3032-CR **Cir. Ct. No. 2002CF162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN A. HERMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dean Hermann appeals a judgment of conviction and an order denying his motion for postconviction relief. A jury found Hermann guilty of operating while intoxicated, fifth offense; possession of methamphetamine; and possession of a short-barreled shotgun. Hermann claims

the search of his vehicle was unlawful and the trial court erred in failing to suppress the physical evidence seized from his vehicle. Hermann also claims he did not have the requisite number of prior offenses to elevate the OWI to a felony offense. Finally, Hermann claims ineffective assistance of counsel. We reject Hermann's arguments and affirm.

¶2 At approximately 1:55 a.m. on August 3, 2002, while travelling southbound, State Trooper Michael Melgaard observed Hermann's pickup truck heading northbound toward him. The truck veered to the right and traveled with its right tires on the edge of the pavement. The truck then veered abruptly to the centerline and crossed it slightly. Melgaard veered to his right to get out of its way. Melgaard turned around and followed Hermann's truck, which signaled a turn into Hermann's long driveway. Melgaard pulled into the driveway behind the truck and activated his emergency lights. As the truck traveled on the driveway, the truck veered off the driveway several feet at least twice. Melgaard notified the dispatcher that the truck was not stopping in the driveway and the dispatcher notified the Sheriff's department for backup. Despite Melgaard's use of the emergency lights and a siren, Hermann did not stop until he came to the end of the driveway, a distance of approximately one-fourth mile.

¶3 Hermann emerged from the truck, lost his balance and sidestepped a couple of feet. Hermann then raised his arms as if upset and began walking briskly toward the officer. Melgaard told Hermann to stop where he was and Hermann momentarily complied, but then told Melgaard that he was on private property and resumed walking toward Melgaard. Melgaard again ordered him to stop, but Hermann turned toward his house and stated that he was going to call his lawyer. Twice more he was ordered to stop, which he did momentarily, and then resumed walking before finally complying.

¶4 Melgaard noticed that Hermann's speech was slightly slurred and at a distance of twenty to twenty-five feet he could smell intoxicants emanating from Hermann. Hermann admitted that he had been drinking and that he did not have a valid driver's license. Hermann refused a request to perform field sobriety tests and said, "You might as well just take me to jail." He was arrested and placed in the back of the squad car.

¶5 By the time Hermann was placed under arrest, several officers had arrived as backup, including Village of Turtle Lake Police Chief Alan Gabe and Barron County Deputy Sheriff Larry Tripp. Hermann's pickup truck was a four-door model with a topper, and Gabe asked Melgaard whether there was anybody else in the truck, to which Melgaard responded that he did not know. Gabe then advised Melgaard that he was going to search the truck for their safety to make sure there was nobody else in the vehicle. Gabe did not initially open a door to the pickup, but rather used his flashlight to look in the rear passenger side window. Gabe observed the butt end of a shotgun with a pistol grip sticking out from underneath the front passenger seat. Gabe also noticed a box of shotgun shells in plain view on the rear floor.

¶6 After Hermann was arrested, Tripp also participated in the search of the vehicle. While looking through the front seat passenger area, Tripp noticed a plastic bag containing a white substance on the passenger seat that appeared to be methamphetamine. Hermann was then transported to the Barron hospital to obtain a blood draw for purposes of chemical testing, where he refused to voluntarily submit a blood sample. However, a sample was compelled and found to contain a BAC of .18 grams. That specific sample was not checked for the presence of methamphetamine or other narcotics. The white substance found in Hermann's vehicle was later determined by lab test to be methamphetamine.

¶7 Hermann moved to suppress the physical evidence, which the trial court denied. A jury found Hermann guilty of OWI as a fifth offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(e); possession of methamphetamine, contrary to WIS. STAT. § 961.41(3g)(dm); and possession of a short-barreled shotgun or rifle, contrary to WIS. STAT. §§ 941.28(2),(3) and 939.50(3)(e).[1] Hermann filed a motion for postconviction relief, claiming his trial counsel was ineffective for failing to introduce evidence of an independent blood test obtained by Hermann that purportedly showed no presence of methamphetamine or other narcotics in his blood. Hermann further argued that he did not have the requisite number of prior offenses to allow for a felony-level sentence on the OWI count. The court orally denied the motion and this appeal followed.

¶8 Hermann does not dispute that he was lawfully arrested. However, Hermann insists that the search of his vehicle was unlawful. Without citation to legal authority, Hermann argues that following his arrest there was no justification for the officers to investigate further and search Hermann's vehicle because the vehicle was lawfully parked on Hermann's own private property. Hermann insists the officers "created an artificial situation" and once arrested "the vehicle could be simply left where it was parked." According to Hermann, the officer's stated basis for the search "can only be described fairly as a pre-textual statement made in an effort to justify the warrantless and unnecessary search of Hermann's vehicle."

¶9 Whether a search of a vehicle is legal presents a question of constitutional fact. ***State v. Pallone***, 2000 WI 77, ¶26, 236 Wis. 2d 162, 613

[1] References to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

N.W.2d 568. There are two components to a review of such a question. Findings of fact will be upheld unless clearly erroneous. ***State v. Martwick***, 2000 WI 5, ¶¶17-18, 231 Wis. 2d 801, 604 N.W.2d 552. We independently apply constitutional principles to the facts. ***Id.***, ¶18.

¶10 Hermann's argument is untenable. The search and seizures were permissible as incidental to an arrest, and also under the plain view doctrine. In ***New York v. Belton***, 453 U.S. 454 (1981), the Supreme Court held that when a law enforcement officer "has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Id.*** at 460 (footnote omitted). The Court also expressly permitted the search of any containers found in the passenger compartment, whether open or closed. *See* ***id.*** at 460-61.

¶11 The Wisconsin Supreme Court applied the ***Belton*** standard in ***State v. Fry***, 131 Wis. 2d 153, 179-80, 388 N.W.2d 565 (1986), which held that a search incident to arrest extends to the glove compartment of a vehicle. The court rejected the defendant's argument that because he had already been removed from the vehicle, the search was no longer incident to arrest. ***Id.*** at 167.

¶12 The ***Belton*** rule was recently extended in ***Thornton v. United States***, 541 U.S. 615 (2004). Thornton was pulled over because he was driving suspiciously and the license plates did not match the car he was driving. Before the officer could pull him over, Thornton turned into a parking lot and exited from his vehicle. The officer pulled in behind him, approached Thornton and placed him in handcuffs in the back seat of the squad car. The officer searched the vehicle and found an unlawfully possessed handgun. ***Id.*** at 617. The Court upheld the search incident to arrest even though Thornton had already exited the

vehicle when police first made contact, and was handcuffed and secured in the squad car before the search ensued.

¶13 ***Thornton*** is squarely on point with the facts of the present case. Like Thornton, Hermann had exited the vehicle and was walking away from it when the officer first made contact. Hermann was lawfully arrested, handcuffed and placed in the squad car before the search began. Only a few moments had passed between the arrest and the search of the car.

¶14 Contrary to Hermann's insistence, there is no authority holding that a search of a recently occupied vehicle incident to a lawful arrest is prohibited simply because the driver finally comes to stop in a private driveway, and such a rule would defy common sense. The search of Hermann's vehicle and the seizure of the contraband were constitutional as incident to the arrest.

¶15 The discovery of the shotgun in plain view provided an additional basis for the search of the vehicle. Seizure of evidence in plain view is permitted under the following conditions:

> (1) The officer must have a prior justification for being in the position from which the "plain view" discovery was made;
>
> (2) The evidence must be in plain view of the discovering officer;
>
> (3) The discovery must be inadvertent; and
>
> (4) The item seized, in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity.

Bies v. State, 76 Wis. 2d 457, 464, 251 N.W.2d 461 (1977) (citations omitted).

¶16 Applying these criteria to the facts of this case, the arresting officer unquestionably had a right to be where he was, and the officers who were present to assist and protect the arresting officer also had a justification for being in the position from which the plain view discovery was made. Second, it is irrefutable that the shotgun was in plain view of the discovering officer. That a flashlight was necessary to see into the vehicle makes no difference. An officer "may use a flashlight to bring into plain sight what natural light would have revealed if the 'look-see' had taken place in daylight." ***Id.*** at 473 (citations omitted). Moreover, an object may be in plain view even if an officer has to crane or bend to be able to see it. ***Texas v. Brown***, 460 U.S. 730, 739-40 (1983).

¶17 With regard to the third ***Bies*** criterion, Hermann asserts without citation to legal authority that the discovery was not inadvertent because Gabe intentionally placed himself in a situation that would allow him to search the vehicle. Contrary to Hermann's perception, the discovery was inadvertent in the sense defined in ***Bies*** because the officer did not know in advance that the evidence would be there. "'Inadvertent' in terms of the plain-view doctrine means, among other things, that a discovery cannot be anticipated." ***Bies***, 76 Wis. 2d at 473 (citation omitted). Under the fourth ***Bies*** criterion, the sawed-off shotgun and shells provided probable cause to believe that there was a connection between the evidence and criminal activity.

¶18 Hermann insists that upon discovering the shotgun, there was no further need for additional officers to look inside the vehicle, and the plastic bag and its contents must be suppressed as a matter of law. We disagree. In an arrest situation, we cannot expect an officer to stop looking for further evidence of the offense, and if authorities discover evidence of a more serious crime during their search, they need not halt their inspection. *See* ***Pallone***, 236 Wis. 2d 162, ¶51.

¶19 Hermann also asserts that Gabe testified at trial that he initiated the search of the truck for the safety of the officers and to check for other individuals in the truck "even though neither Melgaard nor Gabe had reason to believe Hermann was not alone in the vehicle." However, it does not matter that the officers did not offer as their reason for the search that they were looking for additional evidence of particular violations. Courts are not bound by an officer's subjective reasons for the search as long as the circumstances, viewed objectively, justify the action. *See* ***Wren v. United States***, 517 U.S. 806, 813 (1996); ***State v. Mata,*** 230 Wis. 2d 567, 574, 602 N.W.2d 158 (Ct. App. 1999). The discovery of the shotgun and shells in plain view and of the methamphetamine during the ensuing search did not violate Hermann's constitutional rights.

¶20 Hermann next argues that the trial court erred in finding that his conviction for OWI was his fifth offense. Hermann claims that two of his prior convictions were cases in which he was not represented by counsel. Hermann asserts that any prior conviction where the defendant was not represented by counsel cannot, as a matter of law, be counted for purposes of enhancing the penalties or conviction level. Hermann misstates the law.

¶21 "[A] defendant generally may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances the subsequent sentence." ***State v. Stockland***, 2003 WI App 177, ¶11, 266 Wis. 2d 549, 668 N.W.2d 810. An exception to the rule is where the collateral attack is based upon an alleged violation of the defendant's right to counsel. ***Id.***, ¶12. A defendant making a collateral attack on a prior conviction has the initial burden of establishing a prima facie showing of the deprivation of his or her constitutional right to counsel at the prior proceeding. ***Id.***, ¶13. Whether a party has met its prima facie burden is a question of law that we decide independently. ***Id.*** Unlike

on direct appeal, there is no presumption against the defendant's waiver of counsel in a collateral attack. ***State v. Ernst***, 2005 WI App 107, ¶31 n.9, 283 Wis. 2d 300, 699 N.W.2d 92. A prima facie case can only be established by specific and detailed facts showing that Hermann did not knowingly, intelligently and voluntarily waive his right to counsel. *See* ***id.***, ¶¶25-26. Only when a prima facie case has been shown does the burden shift to the State to prove by clear and convincing evidence that there was a proper waiver of counsel. ***State v. Klessig***, 211 Wis. 2d 194, 207, 564 N.W.2d 716 (1997); ***Ernst***, 283 Wis. 2d 107, ¶27.

¶22 In the present case, the State demonstrated by a certified copy of Hermann's driving record abstract, bearing the Department of Transportation seal and the signature of the Department of Motor Vehicles administrator, that Hermann had been previously convicted twice of OWI in Wisconsin and twice of violating Minnesota's implied consent law. A certified copy of a DOT driving record is sufficient to establish prior convictions, including convictions from other states for substantially equivalent offenses. ***State v. Van Riper***, 2003 WI App 237, ¶¶16-17, 267 Wis. 2d 759, 672 N.W.2d 156. Once the State proved the fact of the prior convictions, the burden was upon Hermann to establish a prima facie case by specific and detailed facts that his waiver of counsel in prior criminal OWI convictions was not constitutionally valid. This Hermann did not do.

¶23 As in his brief in support of the postconviction motion, Hermann cites in his brief on appeal to several portions of the record to support his argument that he was not represented by counsel in two prior cases. For example, Hermann cites to court minutes dated April 30, 1991, but it appears from the record that this was Hermann's first OWI offense and thus a civil offense.

Wisconsin does not provide counsel to first offense OWI defendants because the proceedings are civil in nature.[2]

¶24 Hermann also cites to court minutes dated May 13, 1991. However, these four pages of minute sheets do not have legible county names, court case numbers or any certification from the clerk, making it impossible to determine in any definite manner to what case they correspond. Furthermore, these minutes do not appear to describe an OWI conviction but rather an operating after revocation. In addition, the May 13, 1991, minute sheets state: "Ct. finds def freely, vol. waives rt. to atty."

¶25 The record appears to show that Hermann, at best, may have been entitled to counsel only for his OWI conviction in Barron County on July 16, 1996. However, even that record fails to show relevant evidence regarding whether Hermann was represented by counsel. Hermann did not point to any specific and detailed evidence, either in his brief in support of postconviction motion or on appeal, that he did not knowingly, intelligently or voluntarily waive his right to counsel at the time of his Barron County conviction. Because this is a collateral attack, there is no presumption against waiver of counsel. Contrary to Hermann's insistence, the State is not obligated to prove Hermann properly waived counsel in prior cases.

[2] The trial court concluded that Hermann's violations of Minnesota's implied consent law were also civil and Hermann does not dispute that. Thus, Hermann's first three convictions appear to be civil offenses for which he had no right to counsel. *See* ***Schindler v. Clerk of Cir. Ct.***, 715 F.2d 341, 347 (7th Cir. 1983) (assistance of counsel not constitutionally required in civil forfeiture OWI charge and uncounseled conviction of such offense can be used in computing penalties in subsequent OWI prosecution). Thus, whether Hermann was represented or waived counsel in these three cases would be of no constitutional significance.

¶26 Hermann merely cites to one page of the record regarding the July 17, 1996 conviction, but that page contains a minute sheet that does not appear to involve a conviction for OWI, but rather the implied consent law. The DOT records show that Hermann was convicted of both OWI and a violation of the implied consent law. It does not appear that the portion of the minutes relating to the OWI conviction are part of the record on appeal. In addition, Hermann stated in his brief in support of his postconviction motion that the July 17, 1996 case involved a default judgment and the "Defendant made no appearance …." This implies the case was perhaps treated as a civil offense, because a default judgment cannot be entered against a natural person in a criminal case. We conclude the record cited by Hermann lacks specific and detailed facts to satisfy the burden set forth in ***Ernst***. ***Ernst***, 283 Wis. 2d 107, ¶¶25-26.

¶27 Finally, Hermann also appeals from the denial of his postconviction motion claiming ineffective assistance of counsel. This court previously concluded that it has no jurisdiction over that trial court ruling because it has not been reduced to writing. *See* ***State v. Hermann***, No. 2005AP3032-CR (Ct. App. Order Jan. 23, 2006). Therefore, we need not address the issue of ineffective assistance of counsel.

By the Court—Judgment and order affirmed.

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