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DISTRICT II

February 24, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1572-CR State of Wisconsin v. Cory K. Newman (L.C. #2016CF94)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Cory K. Newman appeals from a judgment of conviction for driving with a prohibited alcohol content (9th offense), with a minor in the vehicle. *See* WIS. STAT. § 346.63(1)(b) (2015-

16).[1] Newman pled guilty after his motion to suppress was denied.[2] Newman argues that his suppression motion should have been granted. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We agree with Newman that the suppression motion should have been granted. Therefore, we summarily reverse and remand with directions that the circuit court vacate the judgment of conviction, allow Newman to withdraw his plea, and grant the suppression motion.

The background facts are undisputed. A sheriff's deputy stopped a car driven by Newman at about two o'clock in the morning after Newman failed to dim his high beams as he passed the deputy's parked squad car. Newman's wife and minor child were both passengers in the vehicle. The deputy determined from law enforcement records that Newman's driver's license was expired, that he had eight prior operating while intoxicated (OWI) convictions, that he was on probation, and that as a condition of probation, Newman was prohibited from driving without a valid driver's license.

The deputy did not smell intoxicants when he spoke with Newman, although he testified at the suppression hearing that the smell of intoxicants may have been masked because both Newman and his wife were smoking. The deputy did not ask Newman to perform field sobriety tests.

The deputy decided to issue Newman a citation for driving without a valid driver's license. Because the deputy was aware that Newman was on probation, he asked the dispatcher

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The Hon. Phillip A. Koss denied the suppression motion, and the Hon. Kristine E. Drettwan accepted Newman's guilty plea and sentenced him.

to check if the probation and parole office of the Department of Corrections (hereafter, probation office and DOC) wanted to place a hold on him. After a few minutes passed, the dispatcher told the deputy that she needed to know the reason for the stop, whether Newman was on electronic monitoring, and whether Newman had been drinking. The deputy inferred that he was being directed by the probation office to administer a preliminary breath test (PBT) to determine if Newman had been drinking. The deputy gave Newman a PBT, which indicated his blood alcohol content was .131 percent. Based on the result of that test, the deputy placed Newman under arrest for operating while intoxicated.

Newman moved to suppress the PBT results and derivative evidence, challenging both the traffic stop and the administration of the PBT.[3] The circuit court held an evidentiary hearing at which the deputy testified that he gave Newman a PBT because the probation office asked him to do so. The circuit court denied the suppression motion. The circuit court found that Newman had not consented to the PBT and that the deputy did not have probable cause to ask Newman to take the PBT. However, the circuit court concluded that the administration of the PBT was a valid "probation search."

Newman moved for reconsideration. He obtained recordings of the dispatcher's communication with the deputy and the probation office indicating that the deputy administered the PBT before the probation office even asked the dispatcher whether the defendant was "intoxicated or under the influence of alcohol or drugs." The recordings did not contain any directive from the probation office to administer a PBT.

[3] The constitutionality of the traffic stop is not at issue on appeal and will not be discussed.

In response to the motion for reconsideration, the State provided an affidavit from the deputy indicating that based on his experience and the information provided by the dispatcher, he believed at the time that the probation office was asking him to administer a PBT.

The circuit court found that the probation office did not direct the deputy to administer the PBT, but it recognized that the dispatcher asked questions that she knew the probation office generally asked. The circuit court found that the deputy "reasonably relied on dispatch, reasonably relied on probation and parole." The circuit court further found "that this search was going to happen no matter [what], based on the defendant's status." Therefore, the circuit court denied the motion for reconsideration.

The parties agree on the standard of review, citing ***State v. Jackson***, 2016 WI 56, ¶45, 369 Wis. 2d 673, 882 N.W.2d 422, which states: "Application of constitutional principles in a particular case presents a question of constitutional fact. This court accepts the circuit court's findings of fact unless they are clearly erroneous, but application of constitutional principles to those facts is a question of law that this court reviews de novo." ***Id.*** (citations omitted). It is also undisputed that the administration of the PBT was a warrantless search and that the State had to prove that an exception to the warrant requirement applies. *See* ***Birchfield v. North Dakota***, 579 U.S. ___, 136 S.Ct. 2160, 2173 (2016) (holding that breath and blood tests are searches under the Fourth Amendment); ***State v. Denk***, 2008 WI 130, ¶36, 315 Wis. 2d 5, 758 N.W.2d 775 (holding that "[t]he State bears the burden to prove that a warrantless search falls under one of the established exceptions" to the warrant requirement).

The State does not contest the circuit court's conclusion that the deputy lacked probable cause to request a PBT and its finding that the probation office did not direct the deputy to

conduct a "probation search," which is one of the recognized exceptions to the warrant requirement. *See* ***State v. Griffin***, 131 Wis. 2d 41, 46, 388 N.W.2d 535 (1986) (recognizing the permissibility of probation searches), *aff'd* ***Griffin v. Wisconsin***, 483 U.S. 868 (1987); *see also* ***State v. Devries***, 2012 WI App 119, ¶7, 344 Wis. 2d 726, 824 N.W.2d 913 (recognizing that probation searches can be performed by a police officer "at the request and on behalf of the probation agent"). Instead, the State argues that suppression of the evidence is not warranted because "the evidence would inevitably have been discovered as a probation search." *See* ***Jackson***, 369 Wis. 2d 673, ¶¶47-72 (discussing "the inevitable discovery doctrine," pursuant to which "'evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means'") (citation omitted).

In contrast, Newman argues that the State "failed to prove that a DOC employee would have ordered a PBT" and, moreover, "[t]he DOC could not have obtained the PBT by lawful means." We agree with Newman's second argument and, therefore, we decline to address whether the circuit court's finding that a DOC employee would have directed the deputy to administer a PBT test was clearly erroneous.

As Newman explains in his opening brief, the DOC may conduct a lawful probation search only if there are "reasonable grounds" to do so. *See* WIS. ADMIN. CODE § DOC 328.22(2) (Oct. 2019) (permitting a DOC employee to search an offender "[w]hen an employee has reasonable grounds to believe the offender possesses contraband or evidence of a rule violation on or within his or her person or property"). "In deciding whether there are reasonable grounds to believe that an offender has used, possesses or is under the influence of an intoxicating substance," a DOC employee may consider six factors, including (1) employees' observations;

(2) information from informants; (3) the offender's activity; (4) "[i]nformation provided by the offender"; (5) the employee's experience "with that offender or in a similar circumstance"; and (6) "[p]rior seizures of contraband from the offender." *See* § DOC 328.22(3).

Newman argues that administration of the "PBT would be lawful only if the DOC had reasonable grounds to believe Newman's breath contained evidence that he" was operating while intoxicated or with a prohibited alcohol content. He asserts that the only potentially applicable source of information under WIS. ADMIN. CODE § DOC 328.22(3)—Newman's activity—did not provide reasonable grounds for a search, explaining:

> [The deputy] saw no indication that Newman was under the influence of or had even consumed alcohol. The DOC knew only that he committed one noncriminal traffic violation for driving with a license that expired three months earlier. No matter the time of day, this would not even justify field sobriety testing without an odor of intoxicants or at least one sign of impairment.

The State does not explicitly challenge Newman's application of WIS. ADMIN. CODE § DOC 328.22(3). Instead, it argues that but for the deputy's mistake in believing that the probation office was requesting a PBT, the deputy would have eventually provided "sufficient information to give the DOC employee reasonable grounds to conduct a PBT." The State explains:

> [The deputy] could have told the representative or agent that he stopped Newman's vehicle at 2:19 a.m. for not dimming his vehicle headlights when it approached and passed by a squad car, and, was on extended supervision, did not have a valid driver's license, and was prohibited from driving with an alcohol concentration above .02. And he could have reported that the vehicle was filled with cigarette smoke, and in his experience, people who have been drinking alcohol often attempt to mask the odor of alcohol by smoking cigarettes. With this information, probation and parole would have had reasonable grounds to ask [the deputy] to conduct a PBT as a probation search.

We are not persuaded by the State's argument. The State has not provided any legal authority to support its assertion that a probation search ordered based on those facts would be permissible under WIS. ADMIN. CODE § DOC 328.22(3) and applicable case law. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). We are unconvinced those facts would have provided reasonable grounds to order a probation search.

For the foregoing reasons, we conclude that the suppression motion should have been granted. Therefore, we summarily reverse and remand with directions that the circuit court vacate the judgment of conviction, allow Newman to withdraw his plea, and grant the suppression motion.

IT IS ORDERED that the judgment is summarily reversed and the matter is remanded with directions that the circuit court vacate the judgment of conviction, allow Newman to withdraw his plea, and grant the suppression motion.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals