COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1163-CR **Cir. Ct. No. 98-CF-284**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK R. LOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mark Lowe appeals a judgment convicting him of several drug offenses. Lowe argues that because the arresting officer lacked probable cause to believe a crime had been committed, the trial court erroneously denied his suppression motion. Therefore, Lowe contends that his arrest violated his Fourth Amendment rights. He also challenges his conviction as multiplicitous

and violative of double jeopardy. Lowe further argues that he did not receive a judicial determination to justify or support his warrantless arrest and that the trial court erroneously exercised its discretion by finding there was probable cause.

¶2 We agree with the trial court's ruling on the motion to suppress. There was probable cause to stop Lowe and reasonable suspicion to continue the traffic stop. There was also probable cause to arrest Lowe and search his car. We further agree that the charges are not multiplicitous under the standards for determining double jeopardy challenges. Lowe's erroneous exercise of discretion argument merely rehashes his probable cause argument. Lowe's other contention is not sufficiently developed to be susceptible to appellate review. Therefore, we affirm the judgment.

BACKGROUND

¶3 The underlying facts are undisputed. Wayne Flak, a Wisconsin state trooper, observed Lowe's car as it caught up to Flak on the interstate during the early daylight hours of December 27, 1998. Flak observed Lowe's car straddling the left and right lanes of the interstate. He saw it drift across the right lane and cross over the fog line on the right.

¶4 Flak slowed from sixty-five miles per hour to forty-five to fifty miles per hour. After Flak slowed his car, Lowe also slowed down and did not pass the patrol car. Lowe traveled behind Flak for about a mile or two. Flak pulled over to the shoulder and allowed Lowe to pass him. He then pulled out behind Lowe and followed him for a couple of miles before stopping him and calling for backup.

¶5 Flak walked up to the passenger side of the car and asked for Lowe's driver's license. Lowe gave Flak his Minnesota license. Flak observed personal

belongings and fast food items in the car. Lowe said that he owned the car, but it was not registered to him. He claimed he had not yet transferred title. Flak testified that Lowe and the passenger looked nervous and like they had not slept all night. He said they appeared more nervous than most people at normal traffic stops.

¶6 Flak informed Lowe that he was issuing him a warning for lane deviation and improper registration. Flak went to his squad car and ran checks on Lowe. He then returned to Lowe's car, going to the passenger side. Flak asked Lowe to sign the warning form. As he was talking to Lowe and the passenger, Flak observed what he thought was a "roach" in the ashtray. He testified that roaches are the remains of marijuana cigarettes and that they are distinctive and do not look like tobacco cigarettes. The ashtray was in the console in the front seat, and both the driver and the passenger had access to it.

¶7 Flak asked Lowe to give him the ashtray. Lowe passed the ashtray to the passenger, who passed it to Flak. Flak confirmed that there was a roach in the ashtray and asked Lowe whose it was. Lowe said it was his, but that he had not smoked that day. Flak then asked Lowe to step out of the vehicle.

¶8 After Lowe exited the vehicle, the other trooper patted him down. He found a small baggie of marijuana and placed Lowe under arrest by handcuffing him and placing him in the squad car. The passenger also was identified, searched and arrested when the trooper found marijuana in her purse. Subsequently, the troopers searched the vehicle and found the drugs for which Lowe was prosecuted.

¶9 Lowe was charged with possession with intent to deliver cocaine in an amount greater than fifteen grams, but less than forty grams, as a party to the

crime; possession as a dealer of cocaine without the required tax stamp; possession with intent to deliver marijuana, as a party to the crime; possession as a marijuana dealer without the required tax stamp; and possession of marijuana.

¶10 Lowe filed a motion to suppress the drug evidence found in the car, asserting that Flak had no probable cause to continue the traffic stop. The trial court denied the motion, concluding that Flak properly searched the ashtray because he had a reasonable suspicion there was a roach in the ashtray. The court further found that, when Flak confirmed the roach was indeed marijuana, probable cause existed to arrest Lowe and to search the car. A jury found Lowe guilty, and the trial court entered judgment and sentenced him to fourteen years in prison. The trial court granted Lowe's postconviction motion to vacate his simple possession of marijuana conviction because it was a lesser included offense of possession with intent to deliver. He now appeals the remaining four counts on the judgment of conviction.

DISCUSSION

I. MOTION TO SUPPRESS

¶11 Lowe argues the trial court erred when it denied his motion to suppress evidence based on lack of probable cause. We disagree and conclude that Flak had probable cause to arrest Lowe and search the car.

¶12 In reviewing an order refusing to suppress evidence, this court will uphold the trial court's findings of fact unless they are clearly erroneous. WIS.

STAT. § 805.17(2).[1] Whether those facts satisfy the constitutional requirement of reasonableness under the Fourth Amendment, however, presents a question of law subject to de novo review. ***State v. Gaulrapp***, 207 Wis. 2d 600, 604, 558 N.W.2d 696 (Ct. App. 1996).

¶13 "The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment." ***Id.*** at 605. A traffic stop is generally reasonable if the officers have probable cause to believe a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed. ***Id.***

¶14 Here, the trial court found, and the evidence supports, a traffic stop supported by probable cause. Lowe seems to argue that Flak improperly expanded the scope of the traffic stop when Flak asked Lowe to pass the ashtray to him. Lowe is wrong.

¶15 A detention after a lawful traffic stop must be reasonably related in scope to the circumstances that justified the stop in the first place. ***Id.*** at 606. However, if circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and extend the detention to satisfy those suspicions. ***Id.*** at 609. When there is justification for a traffic stop, it is the extension of a detention past the point reasonably justified by the initial stop, not the nature of the questions asked, that violates the Fourth Amendment. ***Id.***

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶16 Here, Flak testified that he saw a roach in the ashtray. He indicated, in essence, that he was familiar with roaches and knew them to usually contain marijuana. The contraband was in Lowe's vehicle and in an area within his immediate access. These circumstances combined to support probable cause to arrest Lowe for possession of marijuana. The ensuing search for and seizure of controlled substances were incident to Lowe's lawful arrest.

II. DOUBLE JEOPARDY AND MULTIPLICITY

¶17 Lowe argues that his conviction for both possession of cocaine with intent to deliver and possession of cocaine without a tax stamp is multiplicitous subjecting him to double jeopardy. He makes the same argument in reference to his conviction for both possession of marijuana with intent to deliver and possession of marijuana without a tax stamp.

¶18 The double jeopardy clauses of our federal and state constitutions protect against multiple punishments for the same offense. ***State v. Derango***, 2000 WI 89, ¶26, 236 Wis. 2d 721, 613 N.W.2d 833. Whether the State's multiple prosecutions violate Lowe's double jeopardy protections under the Fifth Amendment to the United States Constitution and art. I, § 8, of the Wisconsin Constitution presents a question of law subject to our de novo review. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶19 In ***Derango***, our supreme court recently reiterated the two-part test that guides this court's review of multiplicity challenges:

> The first part consists of an analysis under ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to determine whether the offenses are identical in law and fact. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is

> whether each provision requires proof of an additional fact which the other does not." ***Blockburger***, 284 U.S. at 304. The second part, which we reach if the offenses are not identical in law and fact, is an inquiry into legislative intent.
>
> The ***Blockburger*** test requires us to consider whether each of the offenses in this case requires proof of an element or fact that the other does not. If, under this test, the offenses are identical in law and fact, then charging both is multiplicitous and therefore unconstitutional. If under the ***Blockburger*** test the offenses are different in law or fact, a presumption arises that the legislature intended to permit cumulative punishments for both offenses. This presumption can only be rebutted by clear legislative intent to the contrary.

Id. at ¶¶ 29-30 (citations omitted).

¶20 We conclude that possession of a controlled substance with intent to deliver and the tax stamp violation require the State to prove different elements and facts. Double jeopardy analysis focuses on the statutes defining the offenses, not the facts of a given defendant's activity. *See* ***State v. Carrington***, 134 Wis. 2d 260, 264, 397 N.W.2d 484 (1986).

¶21 The crime of possession with intent to deliver requires the State to prove that the defendant actually intended to deliver what he or she knew or believed to be marijuana or cocaine. *See* WIS JI—CRIMINAL 6020. The tax stamp statute does not require proof of intent to deliver. By contrast, the tax stamp statute requires the State to prove that the defendant possessed a minimum stated amount of a controlled substance. The tax stamp statute also requires the State to demonstrate that the defendant has not paid the appropriate tax on the controlled substance. *See* WIS. STAT. § 139.95(2). Possession of a controlled substance with intent to deliver requires no such proof.

¶22 As we have demonstrated, these offenses require the State to prove different facts and elements. Thus, these multiple prosecutions do not violate Lowe's double jeopardy protections. Because the multiple prosecutions survive the double jeopardy analysis, a presumption exists that the legislature intended to permit cumulative punishments. ***Sauceda***, 168 Wis. 2d at 495. This presumption is overcome only by the demonstration of a contrary legislative intent. *See* ***id.*** Nothing in the statute overcomes the presumption that the legislature intended to punish both crimes when the State could prove the requisite elements. Nor does Lowe demonstrate contrary legislative intent. The offenses are different, and there is no multiplicity or violation of double jeopardy.

III. ABUSE OF DISCRETION

¶23 Lowe seems to contend that the trial court erroneously exercised its discretion by finding that Flak had probable cause to arrest Lowe and search his car. He seems to argue that the court could not find probable cause because the State did not submit a brief on the issue. He is wrong. The State simply relied on the testimony it presented to the court, which was sufficient for the court to find probable cause. Lowe also argues that Flak initially determined nothing was "afoot" beyond the traffic stop and therefore Flak could not expand the scope of the inquiry. This is merely a restatement of Lowe's argument that there was no probable cause. Because we conclude that probable cause existed, the trial court did not erroneously exercise its discretion in so ruling.

IV. UNDEVELOPED ARGUMENT

¶24 Lowe also argues that he "did not receive a judicial determination to justify and/or support his warrantless arrest and exclusion of evidence." This claim is without citation to the record or to any legal authority. As a result, we do

not consider it. WISCONSIN STAT. § 809.19(1)(e) requires appellate briefs to contain "citations to the authorities, statutes and parts of the record relied on[.]" Arguments unsupported by references to legal authority will not be considered. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). The same is true for arguments without references to the record. ***State v. Peck***, 143 Wis. 2d 624, 639-40 n.7, 422 N.W.2d 160 (Ct. App. 1988); *see also* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories.").

By the Court.—Judgment affirmed.

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