

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2001

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. 01-1443
STATE OF WISCONSIN**

Cir. Ct. No. 00-CM-1668

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW COTTON,

DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Andrew Cotton appeals his judgment of conviction of a disorderly conduct municipal forfeiture and an order denying his motion to suppress evidence. Cotton argues that there was no reasonable suspicion to pull

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

his car over and that his continued detention was unjustified. We conclude that Cotton failed to preserve these issues in the context of his plea to a county ordinance violation. We therefore affirm the judgment and order of the trial court.

FACTS

¶2 On April 3, 2000, City of Waukesha police officers Tim Ellis-Stigler and James T. Hoffmann were assigned to enforcement of school activities and were sitting in their unmarked squad car near Waukesha South High School. At approximately 11:00 a.m., the officers noticed several vehicles drive past them that appeared to contain Waukesha South High School student passengers. In one vehicle, which had a Waukesha South High School parking permit attached to the rear view mirror, the officers noticed a young man smoking a cigarette. The officers decided to stop the vehicle to determine if he was of legal age to smoke; by the officers' own admission, this was the only reason they decided to stop the vehicle.

¶3 The officers stopped the vehicle, made contact with the driver, informed him as to the reason for the stop, and identified the driver as Cotton. Cotton provided a valid Wisconsin photo driver's license that confirmed his age as eighteen. The officers determined that Cotton's license was valid. The officers then checked to see if Cotton had any outstanding warrants and whether the car's registration was valid. Finally, the officers checked if the vehicle's license plate was current and valid.

¶4 Before returning to Cotton's car, the officers decided to ask if they could search his vehicle. Upon returning to the car, the officers asked for Cotton's consent to search the vehicle. Cotton refused. As one of the officers was returning Cotton's driver's license to him via the passenger side window, the

officer noticed on the front passenger floor a very small amount of ashes and some burnt green leafy material; the amount of material was smaller in size than the tip of a pinky finger. The officers thought that these ashes might be marijuana residue and placed Cotton under arrest for possession of marijuana. During a search of the vehicle incident to arrest, the officers discovered a glass pipe, consistent with a pipe used for smoking marijuana, in the glove compartment.

¶5 On June 8, 2000, Cotton was charged with possession of THC and possession of drug paraphernalia. On July 11, 2000, Cotton filed a motion to suppress all the evidence obtained from his vehicle. Cotton argued that this evidence was seized as the result of an illegal stop and search in violation of his constitutional rights. A hearing was held on September 8, 2000, to address Cotton's motion.

¶6 At this hearing, Ellis-Stigler testified that after pulling Cotton over, he made the initial contact with Cotton while Hoffmann simply came along to observe. Ellis-Stigler testified that he asked Cotton for identification and then took Cotton's driver's license back to the squad car to run a check on it. Ellis-Stigler testified that as he and Hoffmann were returning to Cotton's car, Hoffmann suggested that they ask for consent to search the car. Ellis-Stigler stated that he went to the passenger side of the vehicle, for safety's sake, while Hoffmann went to the driver's side of the vehicle. Ellis-Stigler initially testified that he asked Cotton for consent to search the car but later testified that it was Hoffmann who asked for consent. Cotton refused.

¶7 Ellis-Stigler then testified that he handed Cotton's license back to him through the passenger side window and had to lean halfway into the car to do so. Ellis-Stigler testified that it was while handing the license back to Cotton that

he saw something on the floor of the passenger side that appeared to be marijuana that had already been smoked. Cotton was then informed that he was under arrest, and he was asked to exit the car from the driver's side. Ellis-Stigler testified that both he and Hoffmann then searched the car together.

¶8 Hoffmann's testimony was somewhat inconsistent with Ellis-Stigler's statements. Hoffmann testified that he, not Ellis-Stigler, made the initial contact with Cotton. Hoffmann testified that he, not Ellis-Stigler, asked for Cotton's driver's license and returned to the squad car to run a check on it. In addition, Hoffmann testified that it was Ellis-Stigler's idea, not his, to ask for consent to search the vehicle and that Ellis-Stigler asked Cotton for this consent.

¶9 Hoffmann testified that from his vantage point by the driver's side door, he never saw any of the marijuana residue that formed the basis for the search. Hoffmann stated that he handcuffed Cotton and placed him in the squad while Ellis-Stigler alone searched the car.

¶10 At the motion hearing, Cotton argued that both the initial stop and the subsequent search were illegal. The court denied Cotton's motion. On May 10, 2001, the State moved the court to dismiss the complaint and amend the charge to a disorderly conduct county ordinance violation. Cotton was not present at this hearing, but his counsel entered a plea of no contest on his behalf to the ordinance violation and the trial court imposed a \$100 forfeiture plus costs and assessments. Cotton appeals.

DISCUSSION

¶11 Cotton makes two arguments in support of his appeal: (1) smoking a cigarette is not sufficiently suspicious behavior to justify a traffic stop; and

(2) his continued detention once his age was determined was illegal. We need not consider these arguments, however, given the events surrounding the disposition of this matter.

¶12 Cotton's arguments address the criminal violations with which he was originally charged, possession of THC and possession of drug paraphernalia. Cotton was criminally charged, and in the context of the criminal case, he filed a suppression motion, which was denied.

¶13 However, at the May 10, 2001 plea and sentencing hearing, the criminal charges were dismissed outright. The State then moved to "amend" the charges to a disorderly conduct county ordinance violation. The State cannot amend criminal charges that have already been dismissed to allege a county ordinance violation; consequently, an entirely new forfeiture action had been initiated.² Cotton pled guilty to this new forfeiture violation and it is from this finding of guilt that he appeals.

¶14 Cotton did not file a suppression motion in the context of the forfeiture action. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. It is a fundamental principle of appellate review that issues must be preserved. *Id.* By failing to challenge the search and seizure in the new forfeiture action, Cotton failed to preserve the right to appeal this issue.

² It must be noted that while the criminal charges were dismissed and forfeiture charges were initiated, there is no record that a forfeiture citation was ever filed. The State would be well advised that if it requests the dismissal of criminal charges and the initiation of forfeiture charges, citations outlining the charges should be filed.

CONCLUSION

¶15 Cotton pled guilty to a disorderly conduct municipal forfeiture action. He did not challenge the search and seizure or make any allegation of a Fourth Amendment violation in the context of this forfeiture action; consequently, he has waived the right to appeal this issue.

By the Court.—Judgment and order affirmed.

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

