COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 02-2244-CR **Cir. Ct. No. 01-CF-290**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. FLAGSTADT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 ANDERSON, J. Mark A. Flagstadt appeals from an order denying his suppression motion and a judgment of conviction, after his no contest plea, for knowingly possessing a controlled substance, in the form of tetrahydrocannabinols

(THC) with intent to deliver contrary to WIS. STAT. § 961.41(1m)(h)1 (2001-02).[1] He argues that his Fourth Amendment right to freedom from unreasonable searches and seizures was violated in several ways: First, it was violated because his noncustodial detention was unreasonable; second, it was violated because the Department of Corrections (DOC) did not have reasonable grounds to place him on a probation hold; and finally, it was violated because the officers did not have probable cause to search his vehicle. We disagree with Flagstadt's arguments. Therefore, we affirm.

Standard of Review

¶2 In reviewing a circuit court's order granting or denying a motion to suppress evidence, the court's findings of evidentiary or historical fact will be upheld unless they are clearly erroneous. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. However, whether the court's findings of fact pass statutory or constitutional muster is a question of law that this court reviews independently. ***Id.*** Despite our de novo standard of review, we hasten to add that we value a trial court's decision on such questions. ***Scheunemann v. City of West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶3 An examination of relevant law reveals that the standard for evaluating each of the issues at bar is reasonableness. First, under ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonableness standard is used for investigative questioning of even ordinary citizens—citizens who are not probationers. *See* ***id.*** at 21-22. "The question of what constitutes reasonable suspicion is a

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

commonsense 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. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶4 Next, under ***State v. Goodrum***, 152 Wis. 2d 540, 545-46, 449 N.W.2d 41 (Ct. App. 1989), a probation or parole hold is proper if the facts and circumstances of the case show that it was reasonable. Furthermore, a probation and parole agent is justified in relying on information provided by police in determining whether to place a probationer on a hold. ***Id.*** at 547.

¶5 Finally, under ***Griffin v. Wisconsin***, 483 U.S. 868 (1987), the United States Supreme Court upheld the constitutionality of a warrantless search of a probationer's home by probation officers. ***Id.*** at 872. There, the Supreme Court held that a "State's operation of a probation system … presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." ***Id.*** at 873-74. The Court then concluded, "[T]he special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by 'reasonable grounds,' as defined by the Wisconsin Supreme Court." ***Id.*** at 875-76. This holding specifically condoned our supreme court's reliance on the Wisconsin Administrative Code regulations in the determination of whether there are reasonable grounds for a probation search. *See* ***State v. Griffin***, 131 Wis. 2d 41, 61-62, 388 N.W.2d 535 (1986), *aff'd*, ***Griffin v. Wisconsin***, 483 U.S. 868 (1987); WIS. ADMIN. CODE § DOC 328.21(7).[2]

[2] The rules regarding search and seizure and custody and detention of probationers are contained in WIS. ADMIN. CODE §§ DOC 328.21 and 328.22 and state in pertinent part:

(continued)

DOC 328.21 Search and seizure. (1) GENERAL POLICY. A search of a client, the client's body contents or the client's living quarters or property may be made at any time, but only in accordance with this section.

….

(3) SEARCH OF LIVING QUARTERS OR PROPERTY. (a) A search of an offender's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband or an offender who is deemed to be in violation of supervision. Approval of the supervisor shall be obtained unless exigent circumstances, such as suspicion the offender will destroy contraband, use a weapon or elude apprehension, require search without approval.

….

(7) REASONABLE GROUNDS. In deciding whether there are reasonable grounds to believe that an offender has used, possesses or is under the influence of an intoxicating substance, that an offender possesses contraband, that an offender's living quarters or property contain contraband or that an offender in violation of supervision is located at the offender's residence, a staff member shall consider any of the following:

(a) The observations of staff members.

(b) Information provided by informants.

(c) The reliability of the information provided by an informant. In evaluating the reliability of the information, the field staff shall give attention to the detail, consistency and corroboration of the information provided by the informant.

(d) The reliability of the informant. In evaluating the informant's reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information.

(e) The activity of the client that relates to whether the client might possess contraband or might have used or be under the influence of an intoxicating substance.

(f) Information provided by the client that is relevant to whether the client has used, possesses or is under the influence of an intoxicating substance or possesses any other contraband.

(continued)

Facts

¶6 The following facts are undisputed. On September 22, 2001, Flagstadt was stopped by Trooper Andrew Hyer for driving a vehicle with an inoperative taillight. Although Flagstadt's driver's license was valid, he was unable to produce it at the time. Hyer told Flagstadt that he would be writing a warning for the inoperative taillight and went back to his cruiser to write up the ticket. During this time, he also ran a Department of Transportation records check and criminal history records check on Flagstadt. From these checks, Hyer validated Flagstadt's identity and learned that Flagstadt had a felony conviction

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(g) The experience of a staff member with that client or in a similar circumstance.

(h) Prior seizures of contraband from the client.

(i) The need to verify compliance with rules of supervision and state and federal law.

DOC 328.22 Custody and detention. Whenever feasible, staff shall rely on law enforcement authorities to take a client into custody. When such assistance is not practical, field staff shall take clients into custody in accordance with this section.

(1) A client shall be taken into custody and detained if the client is alleged to have been involved in assaultive or dangerous conduct. A regional chief may permit exceptions to this subsection.

(2) A client may be taken into custody and detained:

(a) For investigation of an alleged violation by the client;

(b) After an alleged violation by the client to determine whether to commence revocation proceedings;

(c) For disciplinary purposes; or

(d) To prevent a possible violation by the client.

for possession of THC with intent to deliver; he also learned that Flagstadt was on probation. Hyer ran a check on Flagstadt's passenger, which showed that his passenger had a felony record from out of state. Hyer concluded, based on his training and experience, that Flagstadt might be in possession of drugs with the intent to deliver.

¶7 Hyer then asked his dispatcher to contact the Division of Probation and Parole to see whether, as part of Flagstadt's probation restrictions, he was prohibited from associating with other felons. The probation officer on call that evening was Michael Monroe, a supervisor with the DOC probation and parole department. The dispatcher radioed back and forth between Hyer and Monroe to relay Monroe's questions regarding Fladstadt and the situation.

¶8 Monroe testified that his primary guideline for determining whether it is appropriate to put a hold on a probationer is public safety. He explained that the probation and parole division has authority to place a hold on a probationer: (1) if there is a violation, (2) if there is an alleged violation, (3) to prevent a violation, and/or (4) to investigate whether a violation has occurred. *See* WIS. ADMIN. CODE § DOC 328.22(2)(a)-(d). He then stated that given this authority and given that dispatch told him that the officer on the scene suspected drugs in the vehicle, he "thought a hold was in order in this instance."

¶9 Monroe further explained that he placed the hold on Flagstadt because he "thought that [Flagstadt's] agent may want to be aware that Mr. Flagstadt was in the company of another felon from out of the state." Monroe admitted that he did not know whether Flagstadt had a specific restriction placed on him precluding him from having contact with other felons. He explained that he nonetheless considered the hold reasonable because the knowledge he did have

was that Flagstadt, as a felon, is supposed to abide by conduct that is in the best interest of the public welfare and personal rehabilitation, and he believed that "associating with a felon was maybe not in that interest." In addition, Monroe said he believed that, given the officer on the scene's suspicions, the potential was there that drugs were in the vehicle. He also believed that the potential existed that Flagstadt's probation restrictions did in fact include a ban from associating with other felons. In short, Monroe stated that he ordered the hold "to investigate a potential violation, or prevent a violation."[3]

¶10 Once told by dispatch that Monroe was placing a hold on Flagstadt for suspicion of drug possession, Hyer waited for backup and then took Flagstadt into custody. Approximately fifty minutes passed from the time Flagstadt was pulled over at 8:10 p.m. until the time he was taken into custody at 9:01 p.m.

[3] We note that at the time of the stop, Hyer had the benefit of officer training in "drug courier detection" and noticed several indicators of drug running. He observed a multitude of air fresheners hanging from a rearview mirror, which are "common in people who use drugs to mask odor." He noted the car's "lived in look with lots of garbage strewn throughout." He saw dryer sheets spread in the vehicle—another "masking agent [used] to cover the odor of drugs." In addition, he noticed two baby car seats in the back of the car. He said that a car seat, tied with the other indicators of drug dealing, is considered a "good guy symbol" sometimes used by a drug dealer as a ploy to suggest that he or she is a good guy. Hyer added that Flagstadt's criminal history of being a drug courier and Flagstadt's statement before arrest that "he had stopped using drugs because he was diabetic" were also indicators of drug dealing. Hyer concluded that the circumstances signaled that Flagstadt might be in possession of drugs with the intent to deliver.

That said, we emphasize that our decision is not based on the officer on the scene's specific reasons for suspecting drug activity. *Rather*, our decision upholds the reasonableness of the probation agent's decision for the hold, which he testified was based on two factors: (1) that the officer on the scene suspected drug activity and (2) that Flagstadt was with a convicted felon.

In short, today's decision should not be construed as a statement by this court one way or the other with regard to our opinion on police officer use of drug profiling as a law enforcement tool.

¶11 Thereafter, Hyer searched the vehicle with the help of a dog trained in the detection of drugs. The dog retrieved a yellow plastic bag containing four compressed bricks of a green leafy substance, which later tested positive for THC. The total weight of the bricks was 347 grams.

Analysis

¶12 Recently the United States Supreme Court expressed its view with regard to probationers and the governmental interest involved: "[I]t must be remembered that 'the very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.'" ***United States v. Knights***, 534 U.S. 112, 120 (2001) (quoting ***Griffin***, 483 U.S. at 880).

¶13 The first issue is whether trooper Hyer had reasonable grounds to extend Flagstadt's detention after dealing with the reason for the valid stop—the inoperative taillight. An investigative detention is not "unreasonable" if it is brief in nature and justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime. ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984); *see also* WIS. STAT. § 968.24.[4] We hold that the approximately fifty-minute detention—which included the officer's unchallenged investigation of Flagstadt's

[4] WISCONSIN STAT. § 968.24 allows for temporary questioning without arrest and states:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

inoperative taillight—was reasonable under the facts and circumstances of this case.

¶14 After conducting a valid traffic stop for an inoperative taillight, Hyer learned that the driver (Flagstadt) of the vehicle was a probationer convicted of drug trafficking; he determined that the passenger was a convicted felon from out of state; and from his trained observations, Hyer suspected drug activity. Thereafter, Hyer asked his dispatcher to contact the on-call supervisor at the DOC to inform him of Hyer's suspicions of drug activity by a probationer and to inform him that Flagstadt was associating with another convicted felon. Dispatch passed this information on to the supervising probation officer, Monroe.

¶15 Upon hearing of Hyer's suspicions and learning that Flagstadt was with another convicted felon, Monroe asked Hyer several questions through dispatch. Hyer then answered those questions via dispatch. Thereafter, Monroe made his decision to place a probation hold on Flagstadt for suspicion of drug activity. He then communicated his decision to Hyer via dispatch. Hyer waited for backup and took Flagstadt into custody. *See* WIS. ADMIN. CODE § DOC 328.22, which states: "Whenever feasible, staff shall rely on law enforcement authorities to take a client into custody."

¶16 Approximately fifty minutes were spent in the investigatory detention of Flagstadt. This time was spent first by Hyer addressing the inoperative taillight and verifying Flagstadt's identity and driving status after Flagstadt was unable to produce a driver's license. During the balance of this detention, Hyer and the probation officer were communicating back and forth via a dispatcher—this understandably took more time than a direct conversation. This time allowed for the probation officer to make an assessment of the situation

before placing Flagstadt on a hold. Under all the facts and circumstances present, a reasonable police officer could reasonably suspect in light of his or her training and experience that this probationer was engaged in criminal activity. *See* ***Jackson***, 147 Wis. 2d at 834. Thus, we agree with the trial court that this amount of time was reasonable for Hyer to detain Flagstadt in order to inform the probation department of concerns and to await a decision from the probation department regarding its client.

¶17 That determined, we turn to the second issue: Whether the probation hold was reasonable. ***Goodrum*** established that a probation or parole hold is proper if the facts and circumstances of the case show that it was reasonable. ***Goodrum***, 152 Wis. 2d at 545-46. The Wisconsin Administrative Code provides that it is permissible to take a probationer into custody "[f]or investigation of an alleged violation by the client" and/or "[t]o prevent a possible violation by the client." WIS. ADMIN. CODE § DOC 328.22(2)(a), (d). In other words, given the special governmental need for supervision of probationers, a probationer may be taken into custody pursuant to DOC 328.22(2) with less information than is constitutionally required for an arrest. ***State v. Betterley***, 191 Wis. 2d 406, 421, 529 N.W.2d 216 (1995). In fact, the code authorizes a probation agent to search a probationer who has been taken into custody on a probation hold and provides that agents should rely on law enforcement authorities to take a probationer into custody. WIS. ADMIN. CODE §§ DOC 328.21(2)(b)4, 328.22.

¶18 Finally, bearing in mind that the test of reasonableness in Fourth Amendment matters is objective, *see, e.g.*, ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999) (probable cause to arrest and probable cause for search are objective tests), we refine the question before us to be: Whether the probation

officer could reasonably have placed a hold on the probationer based on the information the officer had before him.

¶19 Here, the information possessed by Monroe was that the officer on the scene suspected drugs in the probationer's vehicle and that the probationer's passenger was a convicted felon. A probation and parole officer is justified in relying on information provided by police in determining whether to place a probationer on a hold. ***Goodrum***, 152 Wis. 2d at 547. Therefore, it was not necessary for Monroe to be aware of the factual details that would enable him to draw his own conclusion as to whether Flagstadt really did have drugs in the car intended for delivery. The information provided by Hyer was sufficient to enable a reasonable probation agent to authorize a probation hold. *See* WIS. ADMIN. CODE § DOC 328.22(2)(d) (stating that a client may be taken into custody and detained to prevent a possible violation by the client).

¶20 The third issue, according to Flagstadt, is whether there was probable cause to search his vehicle. We hold that only "reasonable grounds" were needed to search Flagstadt's vehicle and that, under the facts of this case, those grounds existed. We are guided by the United States Supreme Court's holding in ***Griffin***. In ***Griffin***, a probationer with a felony conviction had his home searched by probation officers acting without a warrant. ***Griffin***, 483 U.S. at 870. The officers found a gun that later served as the basis of Griffin's conviction of a state-law weapons offense. ***Id.*** While Griffin was still on probation, the supervisor of Griffin's probation officer received information from a police detective that there were or might be guns in Griffin's apartment. ***Id.*** at 871. Unable to secure the assistance of Griffin's own probation officer, the supervisor, accompanied by another probation officer and three plainclothes police officers, went to the apartment. ***Id.*** When Griffin answered the door, the

supervisor told him who they were and informed him that they were going to search his home. ***Id.*** During the subsequent search—carried out entirely by the probation officers under the authority of Wisconsin's probation regulations—they found a handgun. ***Id.***

¶21 Griffin was charged with possession of a firearm by a convicted felon. ***Id.*** at 872. He moved to suppress the evidence seized during the search. ***Id.*** The trial court denied the motion, concluding that no warrant was necessary and that the search was reasonable. ***Id.*** A jury convicted Griffin of the firearms violation, and he was sentenced to two years' imprisonment. ***Id.*** The conviction was affirmed by this court in ***State v. Griffin***, 126 Wis. 2d 183, 185-86, 376 N.W.2d 62 (Ct. App. 1985).

¶22 On further appeal, our supreme court also affirmed. ***Griffin***, 131 Wis. 2d at 46. It held denial of the suppression motion proper because probation diminishes a probationer's reasonable expectation of privacy such that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only "reasonable grounds" (not probable cause) to believe that contraband is present. ***Id.*** at 45-46. It further held that the "reasonable grounds" standard of Wisconsin's search regulation satisfied the "reasonable grounds" standard of the federal Constitution, and that the detective's tip established "reasonable grounds" within the meaning of the regulation, since it came from someone who had no reason to supply inaccurate information, specifically identified Griffin, and suggested a need to verify Griffin's compliance with state law. ***Id.*** at 61, 63-64.

¶23 The United States Supreme Court affirmed our supreme court, holding that it correctly concluded that this warrantless search did not violate the

Fourth Amendment. ***Griffin***, 483 U.S. at 872. However, the United States Supreme Court explained that it reached the same result as our supreme court but, unlike our supreme court, did not find it necessary to embrace a new principle of law "that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal 'reasonable grounds' standard." ***Id.*** Instead, the United States Supreme Court specifically held that the "search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a [state] regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles." ***Id.*** at 873.

¶24 The language of the Wisconsin Administrative Code regulating this particular area of the law is substantively similar today to the language of the code approved in ***Griffin***. ***Id.*** at 870-71; WIS. ADMIN. CODE § DOC 328.21(3). Today's regulation states:

> **(3)** SEARCH OF LIVING QUARTERS OR PROPERTY. (a) A search of an offender's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband or an offender who is deemed to be in violation of supervision. Approval of the supervisor shall be obtained unless exigent circumstances, such as suspicion the offender will destroy contraband, use a weapon or elude apprehension, require search without approval.

WIS. ADMIN. CODE § DOC 328.21(3).

¶25 Thus, the Wisconsin Administrative Code specifically allows a search of a probationer's property—such as Flagstadt's vehicle—if there are "reasonable grounds" to believe that the property contains contraband. *See* ***id.*** We note that in the case at bar, it appears that even more reasonable grounds existed than those which justified the search upheld in ***Griffin***. The search in

Griffin was based only on a tip received from a police detective that there were or might be guns in Griffin's apartment. ***Griffin***, 483 U.S. at 871. Here, we have not only a tip from a police officer that he suspected drugs were in the vehicle, but information that the probationer was with another felon. Moreover, unlike Griffin, Flagstadt was in custody for a probation hold at the time of the search—a hold we have already concluded to be reasonable. What is more, a probationer has "no greater 'reasonable expectation of privacy' after being taken into custody and detained on a probation hold than does a person who has been arrested." ***Betterley***, 191 Wis. 2d at 420.

¶26 The facts and circumstances of this case met the "reasonable grounds" requirement of the Wisconsin Administrative Code. *See* WIS. ADMIN. CODE § DOC 328.21(3). Therefore, in keeping with the logic of the United States Supreme Court in ***Griffin***, we hold that the search of Flagstadt's vehicle satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles. ***Griffin***, 483 U.S. at 873.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.