COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1050-CR **Cir. Ct. No. 2009CF48**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. DRIESSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: ROBERT E. EATON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kenneth Driessen, pro se, appeals a judgment of conviction for possession of marijuana, second and subsequent offense; possession of drug paraphernalia; and operating while intoxicated, second offense. Driessen argues the circuit court erroneously denied his pretrial suppression motion. He

further contends it is unconstitutional to criminalize marijuana possession, for various reasons. We reject Driessen's arguments and affirm.

BACKGROUND

¶2 Deputy Brian Knapp observed a truck that had a loud exhaust and appeared to be speeding. Knapp followed. As Knapp activated his emergency lights and sirens, he observed the truck driving on the wrong side of the road. During the stop, Knapp found marijuana and a brass smoking pipe on Driessen's person. Driessen was ultimately arrested for operating while intoxicated.

¶3 Driessen, proceeding pro se, moved to suppress evidence found during the stop. The circuit court denied the motion after an evidentiary hearing. Driessen was found guilty at a jury trial. Driessen moved for postconviction relief, again challenging the search and seizure. After a hearing, the court denied the motion in a written order "for the reasons set forth on the record at the time of the hearing." Driessen now appeals.

DISCUSSION

¶4 Driessen first challenges the stop of his vehicle and a pat-down search of his person prior to arrest. The record on appeal does not contain a transcript of either the pretrial or postconviction motion hearings dealing with Driessen's Fourth Amendment challenges.[1]

[1] Driessen asks us to compare a police report with an audio recording of an officer's testimony, which Driessen apparently recorded and posted online at blip.tv and youtube.com. Our review is limited to the record on appeal. *See* WIS. STAT. RULES 809.15, 809.19(1)(d)-(e).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 This court reviews a circuit court's determination of whether a person was seized under the Fourth Amendment as a constitutional fact. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. We accept the circuit court's findings of evidentiary or historic fact unless clearly erroneous. ***Id.*** However, we independently determine whether or when a seizure occurred. ***Id.***

¶6 Driessen challenges the factual findings underlying the circuit court's decision to deny his suppression motion. In the absence of transcripts, his argument fails. "It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal." ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). When the record is incomplete, we will assume the missing material supports the circuit court ruling under attack. *See* ***State v. Holmgren***, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999).

¶7 We next turn to Driessen's challenge to the constitutionality of marijuana possession laws. In the circuit court, Driessen filed a "Notice of Claim of Unconstitutionality" arguing the criminalization of marijuana violated multiple constitutional rights because: 40.6% of Americans have used marijuana; people have an inherent right to the control of their minds and bodies; he holds a religious belief regarding marijuana use; potential jurors who have used marijuana would be too fearful to appear for his trial; and marijuana has proper medical uses. Driessen subsequently filed a nineteen-page motion to dismiss, challenging the constitutionality of WIS. STAT. §§ 961.41(3g)(e) and 961.573(1), further developing the issues raised earlier. It is unclear from Driessen's brief whether the court took any action regarding Driessen's filings.

¶8 First, we address Driessen's argument that the laws prohibiting marijuana possession violate his First Amendment rights. We apply the

"compelling state interest/least restrictive alternative test" when reviewing a claim that a state statute violates freedom of exercise and freedom of conscience. ***State v. Miller***, 202 Wis. 2d 56, 66, 549 N.W.2d 235 (1996). The challenger carries the burden to prove he has a sincerely held religious belief that is burdened by application of the state law at issue. ***Id.*** Only if the defendant meets this burden does the burden shift to the State to prove the law is based on a compelling state interest, which cannot be served by a less restrictive alternative. ***Id.***

¶9 Driessen fails to demonstrate he has a sincerely held religious belief that is burdened by the application of the state law criminalizing marijuana possession. *See* ***id.*** Rather, he merely states in his brief that he "believe[s] cannabis use to be an important part of [his] religious and spiritual experiences," and offers to attend a hearing to express his sincerity in further detail. Driessen fails to inform us whether the circuit court made the factual determination that Driessen does or does not hold such a belief. In the absence of transcripts or citation to the record, Driessen's claim fails. *See* ***Holmgren***, 229 Wis. 2d at 362 n.2; ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (citing WIS. STAT. RULE 809.19(1)(e)).

¶10 Moreover, even if we were to shift the burden to the State to prove the law is based on a compelling state interest that cannot be served by a less restrictive alternative, Driessen's claim fails. We have previously held that because marijuana causes serious problems for society, there is a compelling state interest that overrides the First Amendment interest in using marijuana for religious purposes. *See* ***State v. Peck***, 143 Wis. 2d 624, 634-35, 422 N.W.2d 160 (Ct. App. 1988).

¶11 Driessen next argues there is or should be a medical necessity defense to possession of marijuana and that its omission leads to cruel and unusual punishment under the Eighth Amendment. Driessen states he has depression, and provides an internet citation to show that a psychologist has concluded marijuana is safe and effective for treating depression. Driessen does not assert, however, that any medical doctor has determined Driessen should use marijuana for medicinal purposes or that he has a prescription for such use. Nor does Driessen assert he requested a jury instruction on necessity based on WIS. STAT. § 939.47. We therefore decline to address his argument, as it is inadequately developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶12 Driessen next asserts "unconstitutionality due to overwhelming popularity of use." While he cites various cases and constitutional provisions, Driessen fails to develop a proper legal argument in support of this claim. We therefore decline to address his argument. *See* ***id.***

¶13 Finally, Driessen argues he should have been charged with ordinance violations rather than statutory criminal violations. Driessen's argument is largely incomprehensible. *See* ***id.*** Regardless, the State has great discretion in deciding whether to prosecute a particular case. ***State v. Kramer***, 2001 WI 132, ¶14, 248 Wis. 2d 1009, 637 N.W.2d 35. In order to exercise this discretion, a prosecutor employs a degree of selectivity. ***Id.*** A defendant must make a prima facie showing of discriminatory prosecution before he or she is entitled to an evidentiary hearing on the claim. ***Id.***, ¶13. Driessen fails to make such a showing.

By the Court.—Judgment affirmed.

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