COURT OF APPEALS
DECISION
DATED AND RELEASED

September 20, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1029-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MEYERS,

Defendant-Appellant.

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

SNYDER, J. Jeffrey L. Meyers challenges the denial of his motion to suppress evidence which resulted in his conviction of possession of marijuana with intent to deliver, as party to a crime, contrary to §§ 161.41(1m)(h)1 and 939.05, STATS. Meyers contends that the warrantless search of the van he was driving was not justified by any of the recognized exceptions to the warrant requirement. We disagree and affirm.

The facts are undisputed. On October 6, 1994, Manitowoc County Deputy Sheriff Joseph E. Keil stopped the van because of a defective tail lamp. Meyers identified himself with a valid Wisconsin driver's license. Because the front seat passenger was not wearing his seat belt, Keil also requested his identification. The passenger denied he had identification, but stated he was Kevin D. Batcher and that his date of birth was September 25, 1967.

A record check indicated that Kevin D. Batcher was an alias for Gary Batcher and that an active warrant existed for each name. The response also provided identifying physical marks (a scar and a mole) on the person of Gary, a/k/a Kevin D. Batcher. Keil then opened the van's passenger door to check Batcher against the identifying information.

The open passenger door revealed a small plastic baggie on the van floor. The plastic baggie contained "small particles of a green leafy substance" and "you could smell a slight odor of marijuana." Keil also noticed green, leafy particles between Batcher's legs on the seat and on the dashboard of the van. In addition, Keil noticed green, leafy vegetable material on a table directly behind the driver's seat that appeared to be marijuana.

Keil asked Batcher if he could search the vehicle and Batcher refused.[1] Keil then told Batcher that he believed the van contained marijuana, and he searched the van without Batcher's consent. During the search, an

[1] A prior vehicle registration check indicated that the van was registered to Kevin Batcher rather than to Meyers.

additional plastic bag containing approximately sixty-three grams of marijuana was found behind the driver's seat. Batcher was arrested after the van search.[2]

During the period that Batcher's identification was being established, Meyers had left the van at Keil's request and was seated in Keil's squad car. Meyers complains that: (1) the search was not incident to an arrest, and (2) there was insufficient probable cause to support a warrantless search of the van.[3]

Warrantless searches are per se unreasonable, and the State bears the burden of proving that the search and seizure at issue fall within one of a few, narrowly-drawn exceptions. ***State v. Milashoski,*** 159 Wis.2d 99, 110-11, 464 N.W.2d 21, 25-26 (Ct. App. 1990), *aff'd*, 163 Wis.2d 72, 471 N.W.2d 42 (1991). We will uphold a trial court's findings of fact unless the findings are against the great weight and clear preponderance of the evidence. ***State v. King,*** 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993). However, whether a search or seizure passes constitutional muster is a question of law that we review de novo. ***Id***.

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[2] Keil established the true identity of Batcher when he called Batcher's mother and she identified him as Lan Batcher rather than Kevin or Gary Batcher. A record check indicated that Waukesha County had active warrants for Lan Batcher and he was taken into custody on the warrants after the van was searched.

[3] Meyers suggests in his appeal that his detention was overly lengthy and not justifiable. However, he neither raised nor argued that point to the trial court. We do not consider arguments raised for the first time on appeal. ***Meas v. Young,*** 138 Wis.2d 89, 94 n.3, 405 N.W.2d 697, 699 (Ct. App. 1987).

We agree with the trial court that "the obvious progression of events ... indicates that there was probable cause to search the motor vehicle." Those events include the two observed traffic violations, the identification requests, the indication of active warrants for the passenger, the further investigation of the passenger's identity and the resulting observation of the materials in the van that Keil believed to be marijuana.

Keil observed that the van operated by Meyers had a defective tail lamp in violation of § 347.13(1), STATS.,[4] and that the front seat passenger was not wearing a seat belt in violation of § 347.48(2m)(d), STATS.[5] An officer has a statutory duty to enforce the law where he or she observes a traffic violation. Section 349.02(1), STATS. Having observed the tail lamp violation, Keil legally stopped the van to issue an appropriate citation or warning. *See* ***State v. White,*** 97 Wis.2d 193, 205, 295 N.W.2d 346, 351 (1980).

Because Keil had observed the additional seat belt violation, he had authority to arrest Meyers and Batcher without a warrant for traffic

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[4] Section 347.13(1), STATS., states in part:

> No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order.

[5] Section 347.48(2m)(d), STATS., states in relevant part:

> If a motor vehicle is required to be equipped with safety belts in this state, no person who is ... seated at a designated seating position in the front seat required ... to have a safety belt installed ... may be a passenger in that motor vehicle unless the person is properly restrained.

offenses. *See* § 345.22, STATS.[6] Such arrests are accomplished by the issuance of a uniform traffic citation. *See* § 345.23, STATS. The uniform traffic citation requires the traffic offender's name. *See* § 345.11(2), STATS. Keil was therefore authorized to request identification from both Meyers and Batcher.

To confirm the identifications, Keil requested a record check of each. Because the return indicated that Batcher was the subject of an active warrant, Keil had authority to either arrest him, *see* § 968.07(1)(b), STATS., or to investigate his identity further. Keil chose the latter and opened the passenger door to compare Batcher against the physical identification information he had received.[7] This was reasonable and warranted.

After opening the van door, Keil saw a small plastic baggie on the van floor and testified that "you could see small particles of a green leafy substance and open the baggie up and you could smell a slight odor of marijuana." He observed "more green leafy particles between [Batcher's] legs which appeared to be marijuana, and ... if you looked on the dash of the vehicle there was ... a lot of green leafy particles which also appeared to be marijuana."

Where the police have probable cause to believe that evidence of a crime is in an automobile, a warrantless search may be conducted. ***State v.***

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[6] Section 345.22, STATS., reads:

> A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.

[7] Keil had established that Batcher used a wheelchair and therefore he did not ask him to exit the van.

Tompkins, 144 Wis.2d 116, 137-38, 423 N.W.2d 823, 832 (1988). This is based, in part, on a diminished expectation of privacy in an automobile. ***Id.*** at 128, 423 N.W.2d at 828 (citing ***California v. Carney***, 471 U.S. 386, 392-93 (1985)). Our supreme court has said that "all that is required to justify a search of an automobile is reasonable or probable cause for believing that its contents offend against the law." ***State v. Leadbetter,*** 210 Wis. 327, 333, 246 N.W. 443, 445 (1933). Marijuana, a controlled substance, offends against the law. *See* § 161.14(4)(t), STATS.

Keil, under the facts and circumstances present, had within his knowledge sufficient information to justify as reasonable each step in the procedure that led to the van search and the seizure of the drug evidence. We conclude that Keil had probable cause to search the van after observing that it contained a material that he believed to be marijuana.

By the Court.—Judgment affirmed.

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