COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1019-CR **Cir. Ct. No. 2008CF6**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM W. YEOMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Adam Yeoman appeals a judgment convicting him of attempted first-degree intentional homicide. Yeoman contends that the circuit court erroneously exercised its discretion in refusing to suppress three items of evidence before Yeoman entered a no contest plea. *See* WIS. STAT. § 971.31(10)

(2009-10).[1] We conclude that the circuit court properly decided each of the issues in Yeoman's suppression motion against him, and therefore affirm the judgment of conviction.

BACKGROUND

¶2 A pair of Wisconsin State Patrol officers responded to a dispatch call at 2:00 a.m. about a tavern robbery committed at gunpoint. The dispatch included a description of the suspect as a younger white male with no facial hair, approximately 5'6" or 5'7," wearing a black hooded sweatshirt, and possibly driving a gray Jeep or Blazer headed toward I-90. As the officers were driving on I-90, they observed a two-tone blue and gray Jeep Cherokee covered in salt traveling in the opposite direction along a straight stretch of highway. The only other vehicle the officers observed on the highway was a four-door sedan.

¶3 Despite quickly making a U-turn, the officers had lost sight of the Jeep by the time they reversed direction, from which the officers surmised that the Jeep had accelerated at a high rate of speed. The officers traveled at a rate in excess of 120 miles per hour and caught up to the Jeep about four-and-a-half miles later, from which they calculated that the Jeep must have been going in excess of 90 miles per hour. The Jeep exited the highway as the squad car approached it, and the officers immediately pulled the Jeep over at a stoplight at the end of the exit.

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

¶4 As Yeoman emerged from the passenger side of the Jeep, the officers could see that he matched the description of the suspect in terms of general build and clothing. Once Yeoman was handcuffed and placed in the back of a squad car, a deputy from the La Crosse County Sheriff's office asked him some general questions about where he was coming from and directed another officer to look at the bottom of Yeoman's boots. After noting that Yeoman's story about where he had been did not match that of his sister, who had been driving, the deputy Mirandized Yeoman, and began asking more pointed questions about the robbery. At one point, Yeoman stated:

> I'm done talking [if] you guys think that I'm involved in this, that's insane. I know you don't think my sister was involved in it, so if you've got a videotape, then we can be out of here soon.

After a few additional questions, there was a pause in the interrogation while officers discussed a comparison between the description of a boot print at the tavern and Yeoman's boots, as well as the discovery of a gun in plain view inside of the Jeep. The deputy then resumed the questioning, confronting Yeoman with the shoe print and gun evidence, in response to which Yeoman stated:

> You've got a gun. Then you guys've got the guy.

When the deputy attempted to clarify that statement by asking, "That's you, right?" Yeoman stated:

> I didn't do it. I didn't do nothing man. I'm done. If you guys are pinning this on me, I'm done talking about it.

The deputy then informed Yeoman that he was under arrest.

STANDARD OF REVIEW

¶5 When we review a suppression motion, we will defer to the circuit court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez***, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). We will independently determine, however, whether the facts establish that a particular search or seizure violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

DISCUSSION

¶6 Under the "poisonous fruit" exclusionary rule, evidence that has been discovered as the result of illegal police conduct is subject to suppression. ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963). This rule applies to verbal evidence and observations made by police as well as to tangible physical evidence. ***Id.*** at 485.

¶7 Yeoman claims that law enforcement officers acted improperly when they first pulled him over; when they continued to question him after he had invoked his right to silence; when they looked at the bottom of his boots during the initial questioning; and when they searched his car during the stop. As a result, he argues that the circuit court should have suppressed as evidence the gun recovered from his car, the boot print evidence, and his statement.

Initial Stop

¶8 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures.[2] *See* ***State v. Drogsvold***, 104 Wis. 2d 247, 264, 311 N.W.2d 243 (Ct. App. 1981). The detention of a motorist by a law enforcement officer constitutes a "seizure" of the person within the meaning of the Fourth Amendment. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). However, such detention is not "unreasonable" if the stop is brief in nature, and justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime. *See* U.S. CONST., amend. IV; ***Berkemer***, 468 U.S. at 439; *see also* WIS. CONST., art. I, § 11; WIS. STAT. § 968.24.

¶9 According to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that investigation would be appropriate. ***Id.*** at 21-22. The Wisconsin Supreme Court has outlined six factors to consider when evaluating whether law enforcement had reasonable suspicion to stop a vehicle containing a person thought to be fleeing from a crime scene:

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known

[2] The same standards that have been established for rights arising under the United States Constitution apply to rights derived from the Wisconsin Constitution. *See* ***State v. Harris***, 206 Wis. 2d 243, 259, 557 N.W.2d 245 (1996).

> or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

State v. Guzy, 139 Wis. 2d 663, 677, 407 N.W.2d 548 (1987) (citation omitted). All of the facts and circumstances relating to reasonable suspicion should be balanced according to a common sense test of what a reasonable police officer would suspect in light of the officer's training and experience. ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶10 Here, we conclude that five of the six ***Guzy*** factors support a determination of reasonable suspicion. First, the blue and gray Jeep pulled over was a reasonable match for the description of the gray Jeep or Blazer seen driving off shortly after the robbery, particularly given that the Jeep was salt covered and it was night. Second, the officers spotted the Jeep shortly after the dispatch, limiting the search parameters. Third, the highway was nearly deserted at the time of the stop. Therefore, even if Jeeps and Blazers may be common models, it could be expected there were a limited number of them within the search parameters. Fourth, the Jeep was spotted on the very highway to which the suspect vehicle was last seen heading. And finally, the Jeep accelerated quickly upon first seeing the state patrol vehicle, and pulled off the highway as soon as the state patrol caught up with it. A law enforcement officer could reasonably view that activity as indicative of evasion suggesting a guilty mind. Although the sixth factor weighs against reasonable suspicion, since the officers had not yet even run the plates or identified the occupants of the vehicle at the time of the stop, the initial stop was reasonable under the totality of the circumstances.

Right to Silence

¶11 Before introducing a statement made by a defendant during a custodial interrogation, the State must establish by the preponderance of the evidence both that the statement was given voluntarily, and that it was made with a knowing and intelligent understanding of the constitutional rights being waived. *See generally* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). A suspect undergoing a custodial interrogation has the right to terminate it at any time by making an unequivocal request. ***Miranda***, 384 U.S. at 473-74; ***State v. Markwardt***, 2007 WI App 242, ¶¶35-36, 306 Wis. 2d 420, 742 N.W.2d 546.

¶12 The circuit court found Yeoman's first statement that he was done talking to be ambiguous, but his second such statement to be an unambiguous invocation of his right to silence. Yeoman argues that there was no meaningful difference between the two. We assume without deciding that Yeoman is correct and that the circuit court should have granted Yeoman's motion to suppress his statement, "You've got a gun. Then you guys've got the guy."

¶13 However, for the following reasons we conclude that the harmless error doctrine applies. A constitutional error in a criminal case is harmless when it can be shown beyond a reasonable doubt that it did not contribute to the result. ***State v. Rockette***, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382.

¶14 Here, Yeoman did not explain in his opening brief why or how the admission of his statement would have had any significant effect on his decision to enter a plea, and did not file a reply brief addressing the State's argument that the circuit court's ruling on the admissibility of the statement would have been

harmless. Reviewing the relevant factors ourselves, we agree with the State that any error was harmless.

¶15 To begin with, we do not find Yeoman's statement to be particularly inculpatory. We read the statement as suggesting that if the police had found the gun used in the robbery, it must have been someone else's gun. Yeoman continued to deny involvement throughout his questioning. Therefore, the persuasiveness of this evidence was limited at most. Secondly, whatever persuasiveness the statement might have had pales in comparison with the shoe evidence and gun evidence which, as we shall see, are admissible. Finally, although Yeoman has not told us his reasons for entering the plea, we note that the plea agreement resulted in the dismissal of five other charges, including another attempted homicide count. Weighing the significant reduction in Yeoman's potential sentence exposure against the limited evidentiary value of the statement, we are satisfied beyond a reasonable doubt that Yeoman would not have gone to trial if only his statement had been suppressed.

Search of the Car

¶16 Yeoman next claims that the discovery of the gun in his car was not a proper search incident to arrest because he did not have immediate control over the car at the time of the search, when he was sitting in the back of a squad car in handcuffs, and there was not sufficient reason to believe that his vehicle contained evidence of the offense of arrest. *See* ***Arizona v. Gant***, 556 U.S. 332, 351 (2009).

¶17 The State contends that ***Gant*** is inapplicable for two reasons. First, the search in this case occurred prior to the issuance of the ***Gant*** decision, and it has subsequently been held that ***Gant*** does not require suppression of searches that were conducted in good-faith reliance upon the prior state of the law. ***State v.***

Littlejohn, 2010 WI 85, ¶5, 327 Wis. 2d 107, 786 N.W.2d 123. Second, the State asserts that the gun was discovered pursuant to the plain view doctrine, not the search incident to arrest doctrine.

¶18 Since Yeoman did not arrange to have a transcript of the separate suppression ruling relating to the gun and boots included in the record, we cannot determine which theory the circuit court relied upon. However, the record does contain a transcript of a squad car video in which an officer is heard saying that he saw the gun in plain view, and a photograph of where the gun was discovered supports that assertion. Given Yeoman's failure to reply to the State's assertion that the gun was admissible under the plain view doctrine, and the apparent support for that doctrine in the record available to us, we conclude that the gun was properly ruled admissible. *See* ***State v. Guy***, 172 Wis. 2d 86, 102, 492 N.W.2d 311 (1992).

Examination of Yeoman's boots

¶19 Yeoman challenges the examination of the bottom of his boots—which we will assume, for purposes of this discussion, constituted a search within the meaning of the Fourth Amendment—on the grounds that the police did not yet have probable cause for his arrest when they directed him to lift up his feet.

¶20 A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Drogsvold***, 104 Wis. 2d at 254 (citation

omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. ***Richardson***, 156 Wis. 2d at 148.

¶21 Here, in addition to the original facts discussed above that gave rise to a reasonable suspicion that the stopped Jeep was the vehicle seen driving away from the robbery site, the police discovered during the stop that Yeoman's build and clothing matched the description of the suspect and Yeoman and his sister gave contradictory statements about where they had been, where they were going, and where Yeoman lived. We are satisfied that those facts would lead a reasonable officer to conclude that guilt was more than a possibility.

¶22 Moreover, even if the police were still short of probable cause at the time they looked at Yeoman's boots, we agree with the State that they would inevitably have discovered the same evidence after finding the gun in plain view nearly contemporaneously. ***State v. Lopez***, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996) (evidence may be admitted under the inevitable discovery doctrine if the State can show: (1) a reasonable probability that that the evidence in question would have been discovered by lawful means without the police misconduct; (2) that the leads making discovery inevitable were possessed by the State at the time of the misconduct; and (3) that prior to the unlawful search, the State also was actively pursuing some alternate line of investigation). There were multiple officers on site, and several of them were looking through the windows of the Jeep while other officers were questioning Yeoman and his sister.

By the Court.—Judgment affirmed.

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