COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2427-CR **Cir. Ct. No. 2011CM558**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH F. JOHNSTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Kenneth Johnston appeals a judgment of conviction for operating with a restricted controlled substance in his blood, second offense. Johnston was arrested for the underlying offense after he admitted

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

smoking marijuana to an officer who had just searched his vehicle and found marijuana and drug paraphernalia. On appeal, Johnston argues the officer lacked probable cause to search his vehicle and, therefore, the court erred by denying his suppression motion. We disagree and affirm.

BACKGROUND

¶2 At the suppression hearing, officer Steven Wojcik testified he was traveling on County Road RR in Eau Claire County when he observed two vehicles parked side-by-side in the roadway. Both vehicles were facing Wojcik's direction and were blocking the roadway. As Wojcik approached the vehicles, the vehicle blocking his traffic lane backed up and pulled behind the other vehicle.

¶3 Wojcik passed the first vehicle and noticed the vehicle had a cracked windshield and a nonoperational license plate lamp. Wojcik then passed the second vehicle, turned his squad car around, and stopped the first vehicle for the equipment violations.

¶4 When Wojcik made contact with the driver, who was subsequently identified as Johnston, the vehicle's passenger answered most of Wojcik's questions. Wojcik testified that Johnston would not make eye contact with him and either looked down and away or stared straight ahead. Wojcik also stated that he could "see beads of sweat across [Johnston's] forehead."

¶5 Wojcik shined his flashlight into the rear compartment of the vehicle. He saw an open, but partially empty, eighteen-pack of beer. Wojcik asked Johnston and his passenger whether they were drinking, how much they drank, and whether they had been drinking in the vehicle.

¶6 The passenger told Wojcik that they had "a couple" of beers earlier but had not been drinking in the car. When asked how many beers was "a couple," both the passenger and Johnston stated two. Wojcik testified that he could also smell the odor of intoxicants emanating from the vehicle.

¶7 Wojcik asked Johnston to exit the vehicle to perform field sobriety tests. He observed Johnston's eyes were "red and glossy, wet, almost like they were [a] type of bloodshot." Johnston exhibited two out of six clues on the horizontal gaze nystagmus test, one out of eight clues on the walk-and-turn test, and no clues on the one-leg stand. Wojcik explained that, based on the field sobriety tests, Johnston did not appear to meet the criteria for someone under the influence of an intoxicant. Wojcik then had Johnston take a preliminary breath test, and the result was .00.

¶8 Wojcik testified that Johnston's demeanor combined with the odor of intoxicants did not "add[] up to a PBT result of .00." Wojcik had Johnston sit on his squad car's push bumper and asked the passenger whether there were any open or empty beer cans in the vehicle. The passenger responded negatively.

¶9 Wojcik testified that, because he smelled the odor of intoxicants and because he saw the partially empty beer case, he decided to search the vehicle for open intoxicants. Wojcik explained, "Typically, if somebody has an open container, they put it right down by their feet or they stuff it underneath the seat that they're in." Wojcik first looked under the passenger's seat. He did not find anything, and he moved to the back seat to look at the contents of the open beer case. The case had six cans inside, and twelve were missing. Wojcik touched one can and noted it was very cold to the touch and "to me it was more of a fresh container of beer rather than one that had been sitting there over time." As Wojcik

replaced the beer can, he noticed a book sitting next to the beer case. Wojcik lifted up the book and discovered two open cans of beer that were about three-fourths full.

¶10 Wojcik then looked for more open intoxicants under Johnston's seat. There, he found a multicolored pipe and a plastic baggie filled with a green leafy material, which was later confirmed to be marijuana. Johnston told Wojcik the pipe belonged to him and he smoked marijuana five hours earlier. Wojcik then arrested Johnston.

¶11 The circuit court denied Johnston's suppression motion, concluding the search was "reasonable given all the circumstances which have been articulated; the smell, the peculiar behavior, the fact that there was some ten unaccounted for beer cans, and the officer's subjective testimony that things were not adding up." Johnston subsequently pled to operating with a restricted controlled substance.[2] He appeals.

DISCUSSION

¶12 The review of an order on a motion to suppress evidence presents a question of constitutional fact, involving two standards of review. ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. The circuit court's findings of fact will be upheld unless clearly erroneous. ***Id.*** However, we independently apply the historical facts to the law and constitutional principles. ***Id.***

[2] Johnston was also charged with possession of THC and possession of drug paraphernalia. Upon his plea to operating with a restricted controlled substance in his blood, the other charges were dismissed and read-in.

¶13 Warrantless searches are per se unreasonable unless justified by one of a "few specifically established and well-delineated exceptions" to the warrant requirement. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998) (citing ***Coolidge v. New Hampshire***, 403 U.S. 443, 454-55 (1971)). One such exception is the automobile exception. ***United States v. Ross***, 456 U.S. 798, 799, (1982). Police may constitutionally search a vehicle without a warrant under the automobile exception if the car is readily mobile and probable cause exists to believe it contains contraband or evidence of a crime. ***Id.***

¶14 At the outset, Johnston argues the State did not rely on the automobile exception in the circuit court and the circuit court erroneously determined that Wojcik only had reasonable suspicion to search the vehicle for open intoxicants. Johnston argues a search of a vehicle based on reasonable suspicion is only permitted if the officer needed to search the vehicle for weapons, which did not occur here.

¶15 Johnston's arguments are misplaced. First, the State never argued the search was justified based on Wojcik's need to search the vehicle for weapons. Rather, as both the circuit court and the State noted, the State's position was that the search was lawful because Wojcik had "probable cause [to search] for open containers." Further, the circuit court never determined the search was lawful based on "reasonable suspicion"—it simply stated the search was "reasonable" for reasons it then articulated. In any event, had the court determined the search was lawful based on reasonable suspicion instead of probable cause, our standard of review provides that we independently apply the historical facts to the correct constitutional standard. *See* ***Hughes***, 233 Wis. 2d 280, ¶15. On appeal, both parties agree Wojcik needed probable cause to search the vehicle for open intoxicants.

¶16 Johnston next argues Wojcik did not have probable cause to believe there were open intoxicants in his vehicle. "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Id.***, ¶24 (citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)). Under ***Gates***, 462 U.S. at 238, courts invoke a totality of the circumstances test to determine whether a fair probability exists.

¶17 In this case, before Wojcik searched the vehicle for open intoxicants, Wojcik smelled the odor of intoxicants emanating from the driver-side door. Wojcik knew, based on Johnston's preliminary breath test, that Johnston had not consumed any alcohol recently. At this point, it was reasonable for Wojcik to infer that Johnston was not the source of the alcohol odor. Wojcik also knew that, despite not having consumed alcohol recently, Johnston was sweating and was acting peculiar by not looking at Wojcik. Finally, Wojcik knew there was an open case of beer in the back seat and some of the cans were missing from the beer case. Common sense dictates that an open can of beer emits an odor of alcohol.

¶18 We conclude that under the totality of the circumstances—Johnston's demeanor, the fact he had not consumed any alcohol recently, the open case of beer with missing cans, the odor of intoxicants emanating from the vehicle, eliminating Johnston as the source of the odor, Wojcik had probable cause to believe Johnston had open intoxicants in his vehicle. Although Johnston contends there may have been innocent explanations as to why he was acting peculiar, why Wojcik could smell the odor of intoxicants, and why there was a partially empty case of beer in the back seat, "an officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." *See* ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

¶19 Finally, Johnston appears to challenge the scope of Wojcik's search. He states that Wojcik conducted a "full search of the vehicle," "did not limit his investigation to a brief examination of the car," and "enter[ed] the vehicle three times." However, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." ***Ross***, 456 U.S. at 825. Nothing in the record indicates Wojcik improperly searched portions of the vehicle for open intoxicants—Wojcik simply looked under the passenger's seat, in the area around the beer case, and under the driver's seat. As for Wojcik's triple entry into the vehicle, Johnston does not provide any legal authority for the proposition that an officer may enter a vehicle only one time during a search. We will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address arguments lacking legal authority).

By the Court.—Judgment affirmed.

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