COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2068 **Cir. Ct. No. 2010CF76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Robert J. Rogers, *pro se*, appeals from a judgment of conviction, entered upon his no-contest plea, to one count of possessing with intent to deliver more than ten grams but not more than fifty grams of heroin, as a

party to a crime.[1] *See* WIS. STAT. §§ 961.41(1m)(d)3. and 939.05 (2011-12).[2] He challenges the trial court's denial of his motions to suppress evidence found during a traffic stop and his pre-***Miranda*** and post-***Miranda*** statements to the sheriff's deputy.[3] Rogers argues the merits of the trial court's findings and conclusions, and he also asserts that the trial court did not give its full attention and consideration to the defense's presentation and arguments. We reject Rogers's arguments and affirm.

BACKGROUND

¶2 The following facts are taken from the criminal complaint and motion hearing. Rogers was the front-seat passenger in a vehicle driven by Benjimen Chaltry. A third man named Jacob Martin was in the backseat, although he initially identified himself by a different name. Deputy Barry Nelson of the Sheboygan County Sheriff's Department initiated a traffic stop based on: (1) the lack of a front license plate;[4] (2) a defective registration lamp on the rear license plate; and (3) Rogers's failure to wear a seat belt. Nelson spoke with the vehicle's occupants, including Rogers, who, Nelson said, "appeared to be overly nervous for the type of stop that we were investigating" and was "trembling almost

[1] Postconviction counsel was appointed for Rogers. After reviewing the case, she determined that there were no meritorious issues to pursue on appeal and informed Rogers of his options. Rogers elected to proceed *pro se* with this appeal.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] As Nelson pursued the vehicle, he was able to determine that the rear license plate indicated that the car was registered in Michigan, which is a state that does not require a front license plate.

uncontrollably with his hands." Nelson also testified: "When I first approached the vehicle, I could smell what, based on my training and experience, would appear to be the odor of burnt marijuana."

¶3 Nelson went to his squad car to check whether the driver had a valid license and whether any of the three men were wanted on warrants. Nelson learned that Chaltry's driver's license was revoked and that he had a recent arrest for marijuana possession.

¶4 Nelson subsequently returned to the vehicle and asked Chaltry to step out of the vehicle. He spoke with him about driving with a revoked driver's license and conducted a consensual search of his person. Nelson then had Rogers step out of the vehicle to "find out why he was so nervous" and talk with him about his actions, including his failure to wear a seatbelt. According to Nelson, he asked Rogers if he could search his person and Rogers gave consent. Nelson ultimately recovered from Rogers's sock sixty small bags of what was later determined to be heroin. In addition, in the other sock, Nelson found a syringe with the needle bent into Rogers's toe. Rogers told Nelson that the bags in his sock contained heroin and that they belonged to the man in the backseat. Rogers also told Nelson that man's real name—Jacob Martin. Later, when Rogers was interviewed at the detention center, he told Nelson that he and Martin had gone to Chicago to buy the heroin.

¶5 Rogers was charged with the aforementioned felony, as well as two misdemeanors: possession of cocaine and possession of drug paraphernalia, both as a party to a crime. He filed a motion to suppress the evidence seized at the traffic stop and a motion to suppress the statements he made at the scene and at the detention center.

¶6 The trial court conducted an evidentiary hearing over two days. It found, consistent with Nelson's testimony, that the vehicle's rear license plate was not illuminated as required by law. It concluded that based on that traffic violation, there was probable cause for a traffic stop. The trial court said it need not decide whether Nelson could have seen that Rogers was not wearing a seat belt prior to the stop. It found that by the time Nelson was talking to Rogers, Nelson "certainly had observed that the seat belt had not been worn."

¶7 The trial court further found that Nelson's continued investigation was justified by several facts: (1) the three men were continuously chain-smoking throughout the stop; (2) the driver could not name the hospital that he claimed the three men had been visiting before driving; (3) the men acted nervous; (4) Nelson smelled "the odor of burnt marijuana"; and (5) Nelson learned that the driver and the backseat passenger had past convictions related to marijuana.[5]

¶8 The trial court also found that Rogers consented to the search of his person. Ultimately, the trial court concluded that Rogers's Fourth Amendment rights were not violated by the stop and continued investigation and it denied the motion to suppress.

¶9 The trial court next considered whether Nelson's statements before and after being given ***Miranda*** warnings should be suppressed. It found that there was nothing to indicate that Rogers did not understand his rights and it said that Rogers made "a knowing, voluntary and intelligent waiver" of those rights.

[5] The criminal history associated with the backseat passenger was inaccurate because it was based on the false name the passenger gave, but this was not known to Nelson at the time he checked the man's record.

In doing so, the trial court rejected the argument that Rogers was impaired by heroin and found: "his responses seemed appropriate, [and] his manner of speaking [in the squad and in the detention center] seemed very similar to his manner of speaking here in court today."[6] The trial court noted that Rogers "didn't have any difficulties conversing" or moving. It also found that there was nothing "that was done in [a] coercive nature." It concluded that suppression was unwarranted.

¶10 Rogers subsequently entered a plea agreement with the State pursuant to which he pled no contest to the felony count and the two misdemeanors were dismissed and read in. The State agreed to recommend eight years of initial confinement and seven years of extended supervision, and the defense was free to argue. The trial court accepted Rogers's plea and sentenced him to six years of initial confinement and six years of extended supervision. It also found Rogers eligible for the Challenge Incarceration Program and the Earned Release Program. This appeal follows.

LEGAL STANDARDS

¶11 When we review an order denying a motion to suppress evidence, we uphold the trial court's findings of fact "unless they are against the great weight and clear preponderance of the evidence." ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. When considering the trial court's factual findings, we defer to the trial court's credibility determinations. *See* ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989). The application of

[6] The trial court heard Rogers's voice on the DVD of the stop and on the audio recording of the questioning at the detention center, both of which were played at the hearing.

constitutional principles to the facts is a question of law reviewed *de novo*. ***Dubose***, 285 Wis. 2d 143, ¶16.

¶12 A traffic stop constitutes a seizure that "triggers Fourth Amendment protections from unreasonable searches and seizures." ***State v. Griffin***, 183 Wis. 2d 327, 330, 515 N.W.2d 535 (Ct. App. 1994). "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). Wisconsin law has codified the standard for a temporary stop, allowing an officer to stop any person "when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime." *See* WIS. STAT. § 968.24.

¶13 Before introducing a statement made by a defendant during a custodial interrogation, the State must establish by a 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).

DISCUSSION

¶14 Rogers identifies four issues in his appeal, all of which relate to whether the trial court erroneously exercised its discretion when it conducted the evidentiary hearing. Specifically, Rogers alleges that the trial court: (1) "failed to properly listen to [the] defense[']s arguments, thereby denying Rogers the right to put on an adequate defense"; (2) "interrupted and rushed Rogers'[s] arguments, advising Rogers to hurry up"; (3) failed to properly assess the dynamics of

Rogers[’s] argument in lieu of evidence that supported that both the traffic stop and detention of Rogers was unlawful” [sic]; and (4) “fail[ed] to apply the correct standard of law and legal authority because it was not attentive to Rogers[’s] defense and [was] unwilling to listen to [the] defense[’s] presentation.” (Some capitalization omitted.) In the course of making those arguments, Rogers also challenges the trial court’s decision to deny the motion to suppress the drug evidence and, to a lesser extent, the decision to deny the motion to suppress Rogers’s statements.

¶15 We begin with Rogers’s allegations that the trial court failed to pay adequate attention at the evidentiary hearing. Rogers baldly asserts that the trial court fell asleep as a DVD of the stop was being played. There is nothing in the record to support this allegation. Neither party said anything on the record that would suggest that the trial court failed to pay attention during the two-day hearing, and Rogers did not file a postconviction motion raising these allegations. Rogers’s appendix includes what purports to be a letter from his trial counsel discussing this issue, but that letter is not part of the record and will not be considered. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981) (assertions of fact that are not part of the record will not be considered). The record provides no basis to provide Rogers relief based on his allegations about the trial court.

¶16 In Rogers’s second and third arguments, he contends that the trial court interrupted trial counsel, hurried the hearing along, and “ignore[d] the defense.” Again, the record does not support these assertions. After Nelson finished his direct testimony, trial counsel informed the trial court that she had “a rather lengthy cross-exam” and suggested that the hearing be continued. The trial court agreed and adjourned the hearing as trial counsel had requested. The second

day of testimony and argument took nearly three hours. Trial counsel's cross-examination of the deputy comprised fourteen pages of the transcript, and she also presented Rogers's testimony. There was extensive argument after the testimony, comprising forty-three pages of the transcript. Trial counsel was even allowed to replay portions of the DVD for the trial court during her argument.

¶17 We have identified only two times during trial counsel's argument when the trial court limited her presentation. First, when trial counsel was going to discuss some older case law, the trial court said: "I've got the most recent case. Why don't we just stick with that." Second, after directing the State to address only one issue in its rebuttal, the trial court denied trial counsel's request to present a surrebuttal, explaining: "You had your opportunity to argue. I've heard the arguments being made…. I'm not allowing additional argument because this is just [a] repeat of other information that was there before, and all we'd be going over is the same type of material." Having reviewed the transcripts of the two-day hearing, we reject Rogers's argument that he was denied an adequate opportunity to present his motion.

¶18 Next, Rogers challenges a number of trial court findings and conclusions. We begin with his challenge to the traffic stop. Rogers argues that prior to the stop, Nelson could not have seen that Rogers was not wearing a seat belt. This is irrelevant, because the trial court relied on the lack of a properly lit rear license plate as the basis for the stop. With respect to the improperly lit rear license plate, Rogers argues, as his trial counsel did at the hearing, that the DVD of the traffic stop demonstrated that the vehicle's rear license plate was illuminated. The trial court found otherwise, accepting Nelson's testimony that

the license plate was not illuminated.[7] We defer to the trial court's finding on this issue, as it is the trial court's role to resolve conflicts in testimony.[8] *See* ***Owens***, 148 Wis. 2d at 929-30.

¶19 Rogers argues that there was "no reasonable cause to broaden the investigation beyond what was necessary to resolve the issues of the purpose for the traffic stop." As we have recognized:

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

State v. Colstad, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted). Applying those standards here, we agree with the trial court that there was a basis to extend the stop and begin a new investigation. As noted, the trial court cited specific facts that supported further investigation: the men acted "very nervous" and were chain-smoking, Chaltry could not name the hospital that he claimed they visited, Nelson smelled "the odor of burnt marijuana," and Nelson learned that the driver and the backseat passenger had past convictions related to marijuana. These facts supported further investigation.

[7] Nelson testified that as the vehicle drove by him, he specifically looked at the rear license plate to see where the vehicle was from and he "could not see any plate at all, due to a defective registration lamp."

[8] Moreover, we could not review the DVD because it was not included in the appellate record, even though it is the appellant's responsibility to ensure that the record is sufficient for an appellate court to decide the issues presented by the appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

See ***State v. Secrist***, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999) ("The unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime."); ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W. 2d 681 (1996) ("[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.").

¶20 Rogers also challenges the trial court's findings concerning the search of his person. Rogers asserts that Nelson "advised Rogers that he would be doing a 'Pat Down' search of him for weapons, for which Rogers [did] … not consent[]." These assertions are contrary to the trial court's findings that the search was "not done as a patdown" and that Rogers consented to the search. The trial court's findings are supported by Nelson's testimony and are not clearly erroneous.[9]

¶21 Rogers briefly argues that his statements were made in violation of ***Miranda*** because he "was under the influence of a large dose of heroin … [and] was without the mental capacity needed to be able to make a voluntary statement to any law enforcement officers." We are not convinced. The trial court's findings that Rogers knowingly, intelligently, and voluntarily waived his rights are supported by the record. Rogers's argument that he was too high on heroin to give valid consent was contradicted by Nelson's testimony, the DVD, and the audio

[9] We also note that the State played a portion of the DVD for the trial court, noting that it did not appear that Nelson referenced a "pat down" or search for weapons, contrary to Rogers's testimony.

recording, all of which demonstrated that he answered questions appropriately and appeared to comprehend and voluntarily waive his rights.

¶22 In summary, Rogers's challenges to the trial court's factual findings fail. Rogers presents unconvincing or inadequate arguments challenging the trial court's legal conclusions based on the facts the trial court found.[10] Having reviewed the transcripts and the trial court's decision, as well as the State's thorough briefing of the applicable constitutional law, we agree that based on the trial court's factual findings, the stop and continued investigation were constitutional and Nelson's statements were knowing, intelligent, and voluntary. Therefore, we affirm both the denial of Rogers's motions and his conviction.

By the Court.—Judgment affirmed.

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

[10] To the extent we do not address any of Rogers's assertions or arguments, they are denied because they are undeveloped or inadequately briefed. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments).