

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2006AP1934-CR

Cir. Ct. No. 2004CF3289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEROME ALLEN COOPER,

DEFENDANT-APPELLANT,

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MARONEY, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Jerome Allen Cooper appeals from a judgment of conviction after a jury found him guilty of possession of a controlled substance, and possession with intent to deliver a controlled substance-cocaine (more than 5 grams but not more than 15 grams), second or subsequent offense,

contrary to WIS. STAT. §§ 961.41(1m)(cm)2., 961.41(3g)(e), and 961.48 (2003-04).¹ Cooper claims the trial court erred in denying his motion seeking to suppress evidence obtained during the search of his vehicle. Because the search of Cooper's vehicle was consensual and not rendered involuntary by the extension of his detention for a traffic stop, we affirm.

BACKGROUND

¶2 The relevant factual background forming the genesis of this appeal is predominately undisputed. On June 20, 2004, a police officer, Shannon Lewandowski, while alone on squad patrol on the midnight to 8:00 a.m. shift, was assigned to surveillance duty of a bar located at 2301 West Locust Street in the City of Milwaukee. Surveillance was ordered following a triple-shooting incident in the area. Upon arriving at the site shortly after beginning her shift, Lewandowski noticed a number of people milling about the general area of the tavern. She observed a blue Oldsmobile Cutlass blocking the one-way northbound traffic lane of 23rd street to the east of the tavern. The driver, unknown at the time, was observed talking to a pedestrian. Lewandowski activated her horn, lights, and siren to signal the Cutlass to pull out of the lane of traffic and park. The driver complied.

¶3 Lewandowski approached the vehicle and noted that it contained only the driver. She recognized the Cutlass from a previous domestic violence complaint and investigation. When the driver lowered his darkened window half-way, Lewandowski recognized Cooper as the subject of the earlier domestic

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

violence complaint of “man with a gun.” During the earlier investigation, however, no gun was ever found.

¶4 Lewandowski informed Cooper that he was stopped for the traffic violation of “blocking traffic.” Based upon the earlier domestic violence complaint and information, Lewandowski subsequently learned from official police sources that Cooper was a convicted felon who carries a gun and is a known drug dealer. As a result, she asked Cooper if he had a gun. Cooper responded “no!” Lewandowski then asked Cooper to step out of his car so she could pat him down for her own safety. The request was made because of the vehicle’s extremely tinted windows, the inability to see Cooper’s hands, and Lewandowski’s accumulated knowledge of Cooper’s record. The pat down produced no gun.

¶5 Lewandowski then asked Cooper if he had a gun in the car. He responded no, that he had just returned from Great America. He told her she “could check that he didn’t have a gun.” Contemporaneously, concerned about the superior physical size of Cooper, Lewandowski called for backup. The backup squad arrived “within minutes” and consisted of Officer Laura Captain and Officer Krueger. Krueger remained at the backup squad while Captain, at the behest of Lewandowski, walked over to the west side of the street where Lewandowski was standing with Cooper. Because of Cooper’s size, Lewandowski asked Captain to help her accompany Cooper to the front of the backup squad where Krueger was standing. Lewandowski’s reason for this action was that while she was bent over searching the interior of the car, she did not want Cooper to be nearby. While the three officers and Cooper were on the west side of the street, Lewandowski again asked Cooper if he had a gun in his car and asked for consent to look. Cooper

denied having a gun and consented to the search, stating: “Yeah, I just got back from Great America.”

¶6 With that statement from Cooper, Lewandowski began to search under the front seats of the car. She did not find a gun. A console was located between the two front bucket seats. As Lewandowski pushed herself back up out of the left front area, her hand brushed against the top of the console, dislodging it in the process. As a result a bag containing what proved to be cocaine and marijuana became visible. Cooper was arrested and charged with the drug violations.

¶7 Cooper moved to suppress the evidence based on violations of WIS. STAT. §§ 968.24 and 968.25,² arguing that his constitutional rights were violated

² WISCONSIN STAT. § 968.24 reads as follows:

Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person’s conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

WISCONSIN STAT. § 968.25 reads as follows:

Search during temporary questioning. When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public

(continued)

on June 20, 2004, when the officer stopped him, questioned him, and searched his automobile. In contrast to Lewandowski's testimony during the motion to suppress hearing, Cooper denied he was blocking traffic, claiming he was parked at the curb. Cooper also, on three separate occasions, denied he was ever asked to consent to a search of his car for weapons. After a hearing, the trial court denied his motion. In so doing, the trial court explained as follows:

The Court had the opportunity to -- The Court doesn't believe it needs any additional arguments. It appears that -- and the Court has had the opportunity to review the transcripts again also.

It appeared that somewhere in the vicinity of June 20, Officer Lewandowski was on patrol, was sent over to or received the call and was dispatched by a Captain Orr to an assignment to a tavern on 23rd and West Locust in the City of Milwaukee.

There apparently were recurring problems at that establishment. But at the time the defendant was there, he had parked his car somewhere in the vicinity of the street in front of the tavern and the police officer's observation was that she had known him or had some contact with him and there was some reason to believe that the defendant may be in possession of a gun, but the point is that he was in the street and he was obstructing traffic at the time.

There was a -- Subsequently thereafter, he was pulled over or asked about whether or not he had any weapons on him. He said that he didn't. There were a number of times that he was asked. It's not rebutted. And because of the tinting of the windows there was concern for

places by law abiding persons. If the law enforcement officer finds such a weapon or instrument, or any other property possession of which the law enforcement officer reasonably believes may constitute the commission of a crime, or which may constitute a threat to his or her safety, the law enforcement officer may take it and keep it until the completion of questioning, at which time the law enforcement officer shall either return it, if lawfully possessed, or arrest the person so questioned.

the police officer's safety along with some previous knowledge that the defendant may be carrying a weapon.

So the backup was called and subsequently thereafter the backup came and the defendant was taken to the other side of the street. There was some question as to whether or not one of the others remained in the car or did remain in the car. That was somewhat inconsistent.

The defendant did in fact testify there was an issue as to whether or not there was a consensual search, but certainly there was a search incident to the stop as far as the Terry stop when you look at what occurred, the reason for the stop, the reason why the search of the vehicle was done.

Basically, simultaneous with this stop was because the police officer wanted additional backup. Subsequently, the backup came and a search was conducted of the automobile for what first appeared to be the gun. During the course of that search, something was lodged in the console of the vehicle and broke, and there -- then was viewed a quantity of cocaine that was in the compartment of the car that was in plain view of the officer during the search.

So based upon the totality of the circumstances, the Court believes that the defendant's Fourth Amendment rights were not violated. That's the decision of the Court.

....

The Court should mention in assessing the credibility of all the witnesses that testified, I took that into consideration when the Court reached its decision including the consent issue.

ANALYSIS

STANDARD OF REVIEW AND APPLICABLE LAW

¶8 On review of a trial court’s ruling on a motion to suppress evidence, we shall uphold the court’s findings of fact unless they are clearly erroneous and independently determine whether the investigative detention was constitutionally reasonable. *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). “The question of what constitutes reasonable suspicion is a commonsense test.” *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. The test is an objective one, *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996), and the suspicion must be grounded in specific articulable facts along with reasonable inferences from those facts. *Colstad*, 260 Wis. 2d 406, ¶8. When determining whether reasonable suspicion exists, we examine the cumulative effect of the facts in their totality. *Waldner*, 206 Wis. 2d at 58,. “[C]onduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity...and in assessing the officer’s actions, we should give weight to his or her training and experience, and the knowledge acquired on the job.” *Betow*, 226 Wis. 2d at 98.

¶9 The temporary detention of an individual during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a “seizure” of a person within the meaning of the Fourth Amendment. *State v. Harris*, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). In a traffic stop we evaluate the reasonableness of a police officer’s conduct under principles similar to those used to address a *Terry*³ stop. If, during a valid traffic stop, the

³ See *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968).

officer becomes aware of additional suspicious factors or additional information that would give rise to an objective, articulable suspicion that criminal activity is afoot, separate and distinct from the acts that prompted the officer intervention in the first place, the stop may be extended and a new investigation begun. *Betow*, 226 Wis. 2d at 94. The officer need not terminate the encounter simply because further investigation is beyond the scope of the initial stop. *Id.* at 94-95.

¶10 For the plain view doctrine to apply, the evidence must be in plain view, the officer must have a lawful right of access to the object itself, and the object's incriminating character must be immediately apparent. *Horton v. California*, 496 U.S. 128, 135-36 (1990). "To show that the incriminating character of an item was immediately apparent, police must show they had probable cause to believe the item in plain view was evidence or contraband." *State v. Guy*, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992).

¶11 "It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

APPLICATION

¶12 On appeal, Cooper does not challenge the validity of his initial stop. Rather, he challenges the duration of his detention thereby rendering any consent to search a nullity. In doing so, he posits several objections to the trial court's ruling. We now address each contention in turn.

¶13 Cooper's central claim is that Lewandowski did not have any basis to reasonably suspect that he was armed or carried a weapon in his vehicle. His first argument supporting this claim is the lack of reliable information that he

“routinely went armed.” In his brief, Cooper contends that: Lewandowski’s “suspicion that Mr. Cooper had a weapon was based on nothing more than a recent domestic violence incident reporting ‘subject’ with a gun, which report was unsubstantiated.” The record belies this claim.

¶14 When Lewandowski was cross-examined by Cooper’s counsel, the following exchanges took place:

Q. [Counsel] ... So if you put in your report one of your reports that he was known to carry a gun, that wasn’t from your personal experience, was it?

A. [Lewandowski] It was from his girlfriend.

Q. Who was there when you reported to the domestic [sic]?

A. Yes, she was there.

....

Q. [Counsel] You said you have prior knowledge that he’s a convicted felon who carries a gun and is a known drug dealer?

A. That’s correct.

Q. And that was all from, what, that one domestic hitch you got?

A. Yes, it was.

Q. It wasn’t police shared information. It was something that somebody must have told you at the domestic disturbance?

A. It was after the domestic disturbance and running a wanted check and some history on him.

¶15 This excerpt demonstrates that Lewandowski’s basis for believing that Cooper carried a gun came from two sources: his girlfriend and official police sources. Here, any effort to suggest the impropriety of considering these sources

by the trial court is of no avail. A defendant “cannot prevail on an argument that the court *must* apply the rules of evidence at a suppression hearing.” *State v. Jiles*, 2003 WI 66, ¶¶29-30, 262 Wis. 2d 457, 663 N.W.2d 798 (alteration in original) (“At a suppression hearing, the court may rely on hearsay and other evidence, even though the evidence would not be admissible at trial.”).

¶16 Cooper ignores what Lewandowski discovered when he rolled the tinted driver’s window half-way down. She recognized him as the subject of the domestic violence report and the knowledge she acquired about his past came quite naturally to mind. It is not unreasonable to conclude that the circumstances provided a basis for more questioning, invoking further precautionary measures, all of which quite naturally would extend the period of detention. *Betow*, 226 Wis. 2d at 94-95. Recognition of Cooper and knowing his past, triggered Lewandowski’s question about whether he had a gun and her request for Cooper to step from the car for a pat down. Our courts “have found that drug dealers and weapons go hand in hand, thus warranting a *Terry* frisk for weapons.” *State v. Richardson*, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990). Thus, Cooper’s arguments about the lack of reliable information relating to carrying a gun and that he was a drug dealer fail.

¶17 To further support his argument, Cooper reasons that Lewandowski’s conduct toward Cooper after the traffic stop renders incredible her suspicion that Cooper was armed. We are not convinced.

¶18 Cooper reasons that if Lewandowski was so concerned about Cooper’s size, she should have drawn her service revolver or handcuffed him. Doubtless, Lewandowski could have pursued either one of those two options, but it is no less plausible to quickly summon backup to avoid any possible threatening

physical contact with a larger detainee or inciting a large gathering of people by drawing a weapon in the early morning hours. The course of action chosen by Lewandowski by no means renders the basis of her suspicion incredible. Nor was the manner in which she asked Captain to assist her inconsistent with accepted police investigative techniques.

¶19 Next, Cooper argues that his detention went far beyond what was necessary for the traffic stop, thus rendering any “consent” involuntary. This contention can be examined in the context of the circumstances prompting Lewandowski to ask Cooper to step from the car for the purposes of the pat down. After the pat down had been completed, Lewandowski, based upon her knowledge of Cooper’s record, asked whether he had a gun in the car. After he replied in the negative, he stated she could “check that he didn’t have a gun.” Cooper denied that he ever consented to a search. On appeal however, Cooper does not advance any claim of lack of consent. Thus, we hold he has abandoned the issue. *See State v. Johnson*, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994) (issue raised in the trial court but not briefed or argued on appeal is deemed abandoned).

¶20 Contemporaneously with Cooper’s expression of consent, Lewandowski took the precautionary measure of requesting backup because she did not want Cooper unattended while she was reaching into the car with her back towards him. Cooper, relying upon *State v. Luebeck*, 2006 WI App 87, ¶¶2, 4, 15, 292 Wis. 2d 748, 715 N.W.2d 639, claims that Lewandowski’s additional detention of him “at least approached, if not exceeded, the twenty minutes” found excessive in *Luebeck*. We reject this argument. Cooper presented no evidence on the length of time from the actual stop and the first consent to search. His claim is sheer speculation. The record reflects he was detained for just that amount of time it took to exit his vehicle, be frisked, and then consent to a search. Any additional

time was caused by reasonably employed safety precautions necessary to accomplish the search. There was no unjustified extension of detention. Thus, the argument that consent became involuntary fails.

¶21 In summary, Cooper was initially detained for a traffic violation. When his identity became known to Lewandowski, the prior domestic violence complaint and his past record formed the basis for a cautionary reaction. That Lewandowski could have pursued other options to secure her personal safety is beside the point if the course of action she chose was reasonable under all of the circumstances. When considering the circumstances in which she found herself, combined with her acquired knowledge about Cooper, her professional experience provided sufficient reasonable articulable bases for executing the initial cautionary measures that she took.

¶22 Last, Cooper claims the drugs found in his vehicle's console were not in "plain view" but were revealed only in the course of an illegal search. As stated earlier in this opinion, the initial traffic stop has not been challenged nor has the initial consent to search. Furthermore, we have concluded that any extension of the duration of his detention was, under the totality of the circumstances, a reasonable adjunct to the traffic stop. Such being the state of the record, with the search being consensually valid, the evidence observed by Lewandowski was in "plain view." See *Bies v. State*, 76 Wis. 2d 457, 464, 251 N.W.2d 461 (1977). We affirm.

By the Court.—Judgment affirmed.

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