State of Wisconsin
Court of Appeals
District 1
Appeal No. 2010AP002553 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Little Al Stewart,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Rebecca Dallet, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I. Whether the appellant, Stewart, had standing to challenge the police search of a white plastic bag that he had put into the trunk of his daughter's car where: (1) the daughter came to the airport to pick up Stewart; and, (2) Stewart had put the plastic bag into the trunk of the car immediately before he was arrested by the police.

ANSWERED BY THE TRIAL COURT: No.

II. Whether the trial court erred in denying Stewart's motion to suppress evidence discovered as a result of an unreasonable, warrantless arrest, where the police had information from a confidential informant that Stewart might be carrying cocaine on a flight from Las Vegas to Milwaukee, and the police arrested Stewart almost immediately upon Stewart disembarking from the airplane.

ANSWERED BY THE TRIAL COURT: No.

Summary of the Argument

I. Stewart had a legitimate expectation of privacy in the contents of the white plastic bag. The trial court analyzed the standing issue in terms of whether Stewart had a reasonable expectation of privacy in the trunk of his daughter's car. The court found that Stewart did not have standing to challenge the search of trunk.

The trial court's analysis, though, entirely misses the point. The question is not whether Stewart had standing to challenge the search of the trunk. The question is whether Stewart had standing to challenge the search of the white plastic bag.

Where a person only temporarily relinquishes control over an object that contains other items, he maintains a legitimate expectation of privacy in the individual items that are contained in the object. On the other hand, where a person abandons property, he no longer has any Fourth Amendment interest in the property.

Here, Stewart plainly did not abandon the white plastic bag. He only temporarily relinquished control over the bag when he put it into the trunk of his daughter's car. Thus, Stewart had standing to challenge the search of the bag.

II. There was no probable cause to arrest Stewart at the point he was taken into custody. The first step in analyzing any Fourth Amendment issue is to determine whether any constitutionally protected interest was involved. Here, Stewart was physically moved away from the automobile, directed to the ground, and then handcuffed-- all before the police ever even searched the white plastic bag. Thus, he was immediately under arrest. There plainly was no probable cause to arrest him at that point. The only "articulable fact" that the police possessed was the prediction of some criminal named "Black" that Stewart would possessing cocaine at some point in the near future. Based on that prediction alone, the police arrested Stewart.

Statement of the Case

I. Procedural History

The defendant-appellant, Little Al Stewart ("Stewart") was charged with one count of possession of a controlled substance (cocaine) with intent to deliver. (R:1) Stewart entered a not guilty plea to the charge.

Stewart filed a pretrial motion to suppress all evidence seized by police after a warrantless arrest of Stewart. The motion alleged that the police lacked probable cause to arrest Stewart (shortly after getting off the airplane, and immediately

after he tossed the bag he was carrying into the trunk of his daughter's car). Stewart claimed that the police discovered the cocaine in the trunk of his daughter's car only after he was already under arrest. Prior to the hearing, the State did not respond to Stewart's motion; however, the State did file a posthearing brief in which the issue of standing was first raised. (R:9)

On July 17, 2009, the trial court conducted a hearing into Stewart's motion. At a later decision hearing, the trial court denied the motion. Thereafter, Stewart pleaded guilty to the charge and he was sentenced to nine years in prison (six years initial confinement and three years of extended supervision) imposed and stayed; and, instead, the court placed Stewart on probation for four years.

Stewart timely filed a notice of intent to pursue postconviction relief, and then timely filed a notice of appeal to the Wisconsin Court of Appeals. Stewart only appeals the trial court's denial of his motion to suppress.

II. Factual Background (Motion Hearing)

Stewart was arrested on March 11, 2009 shortly after midnight at General Mitchell International Airport in Milwaukee. (R:23-8, 9)

Agent Timothy Gray testified that at about 11:30 p.m. on March 10th, 2009 he went to the airport because, earlier in the day, he had received a telephone call from a

confidential informant who told Gray that a man would be arriving on a commercial airliner from Las Vegas (R:23-21) with approximately 13.5 ounces of cocaine. (R:23-10). According to Gray, the informant claimed that he had an "associate" who was "very close" to this man, and that the associate had actually made the arrangements to have the cocaine delivered. *Ibid.* The informant identified this associate as "Black". (R:23-18) The informant, though, did not know the true identity of Black (R:23-38) Agent Gray, for his part, did not know who Black was, and Black was not a cooperating witness with the government. (R:23-39) Black, of course, did not know that the informant was providing information to law enforcement. (R:23-19)

At the time of the informant's first call to Gray, the informant did not know the name of the man who would be flying to Milwaukee from Las Vegas; rather, the informant identified the man as a "guy who had been arrested with Alderman Michael McGee". (R:23-17) Gray then obtained photos of the suspects in the McGee case, and he was eventually able to determine that the suspect's name was Little Al Stewart. (R:23-36)

When Gray arrived at the airport he obtained information from Midwest Express Airlines that it had a flight coming in from Las Vegas at approximately 11:30 p.m., and that "Little Al Stewart" was a passenger on the plane. (R:23-21)

Gray watched the passengers get off of the airplane, and

he eventually saw Stewart, who had a white plastic Walmart bag in his hand. (R:23-23) Gray could not tell whether there was anything in the bag. (R:23-24, 25) Gray watched Stewart for a few minutes but, when Stewart left the baggage claim area and went toward a waiting car, Gray believed that Stewart was "staring" at him and the other officers. (R:23-25). The car that Stewart approached was registered to, and was being driven by, his daughter, Tamara Stewart. (R:23-31) The trunk of the car was open.

The agents-- there were a total five of them-- decided to approach Stewart and, according to Gray, Stewart at that point made a "furtive" movement by putting the white bag into the trunk of the car. *Ibid.* As agents approached, they announced themselves as the police, and commanded Stewart to put his hands behind his back. (R:23-28) Gray testified that, at that point, Stewart was "taken into custody." *Ibid.* Within seconds, Stewart was prone, on his stomach, being handcuffed. (R:23-42). All of this occurred before the police went into the trunk, got the plastic bag, and searched it.

After Stewart was in custody, the trunk of the vehicle was searched, and the agents determined that the white bag that Stewart had tossed into the trunk contained suspected cocaine. (R:23-28)

The trial court found that Stewart had no standing to challenge the search of the trunk of his daughter's car-- the car that had come to pick him up from the airport. The trial court reasoned:

If it's something that was private, keeping it in a plastic bag-- doesn't lend well to the argument that it was being put to some kind of private use or that it needed to be private. Throwing it into the back of the car in the manner in which it was thrown in doesn't go toward that.

I don't think Mr. Stewart had any right to exclude others from that trunk. It's not his car. It's his daughter's. And I think that looking at all those factors and looking at what we as a society recognize as what we would have an objectively reasonable expectation of privacy in, I don't think that there is such an expectation that there be that privacy in that area in which it was thrown.

So I start by saying I don't think there's standing for the-- for the seizure of the bag . . . .

(R:24-7). Nonetheless, the court also analyzed whether there was probable cause to arrest Stewart. The judge said:

So I do think that whatever reliability or credibility is the CI's reliability and credibility, I don't need to do a separate analysis of Black's knowledge; but I do think that given the past incidents or contacts that the CI had with Black that that reasonable doubt-- reason-- reliability and credibility is established based on those contacts.

So I do think there is that reasonable suspicion to stop Mr. Stewart. What happens when they go to stop Mr. Stewart is that he then is ordered to stop. And at the time the officers say put your hands behind your back, and they see him put the bag in the trunk.

There is an analysis there as to whether-- when-- at which point he was actually seized. I don't think it's until he submits to their authority, which is when does, in fact, comply with the instructions and stop.

It's really after he throws the bag. So I think even the throwing of the bag can be taken into account in terms of whether

there's probable cause to arrest.

But I do think that based on all the information given, there was probable cause to arrest Mr. Stewart. Based on the fact that he threw the bag, I think even makes it stronger that there was a probable cause that he would, in fact, have the drugs that a CI had given information about him carrying.

So I do find that there is probable cause to arrest Mr. Stewart. . . . .

(R:24-12, 13)

Argument

I. Stewart did not abandon the plastic bag; and, therefore, he has standing to challenge the search of the trunk of his daughter's car.

The trial court analyzed the standing issue in terms of whether Stewart had a reasonable expectation of privacy in the trunk of his daughter's car. The court found that Stewart did not have standing to challenge the search of trunk.[1]

The trial court's analysis, though, entirely misses the point. The question is not whether Stewart had standing to challenge the search of the trunk. The question is whether

[1]Before the trial court Stewart maintained that he did have a legitimate expectation of privacy in the trunk of the car. Stewart still contends that he had an expectation of privacy in the trunk of the car; however, upon further consideration, it does appear that the correct analysis is the one set forth in this brief-- whether or not Stewart abandoned the white plastic bag.

Stewart had standing to challenge the search of the white plastic bag.[2]

Where a person only temporarily relinquishes control over an object that contains other items, he maintains a legitimate expectation of privacy in the individual items that are contained within the object. On the other hand, where a person abandons property, he no longer has any Fourth Amendment interest in any of the property.

Here, Stewart plainly did not abandon the white plastic bag. He only temporarily relinquished control over the bag when he put it into the trunk of his daughter's car. Thus, Stewart had standing to challenge the search of the bag.

A. Standard of Appellate Review

"The question of whether a party has standing to challenge the constitutionality of a search and seizure based upon a given set of facts is a question of law" and, therefore, the appellate court makes its own determination on this issue without any deference to the lower court. *State v. Fillyaw*, 104 Wis. 2d 700, 711 (Wis. 1981)

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[2]The claim in Stewart's motion before the trial court was that he was arrested before the cocaine was discovered. Thus, whether Stewart has standing to challenge the search of the trunk is independent of that issue. Nonetheless, the trial court analyzed the issue of standing at length. It is conceptually possible that the Court of Appeals could find that there was no probable cause to arrest Stewart; but also find that the cocaine is not subject to suppression because Stewart had no standing to challenge the seizure of the cocaine.

B. Stewart had a legitimate expectation of privacy in the white plastic bag that was searched by police.

Whether an individual had a reasonable expectation of privacy in an area subjected to a search depends on two prongs.(internal citations omitted) First, whether the individual's conduct exhibited an actual (i.e., subjective) expectation of privacy in the area searched and the item seized. Then, if the individual had the requisite expectation of privacy, courts determine whether such an expectation of privacy was legitimate or justifiable (i.e., one that society is willing to recognize as reasonable).

State v. Bruski, 2007 WI 25, P23-P24 (Wis. 2007).

The United States Supreme Court, the federal courts, and the Wisconsin state courts have repeatedly made it clear that it is possible for a person to retain a property interest in an individual item but nonetheless relinquish the reasonable expectation of privacy in an object containing the item. For example, even though a person may temporarily place his gym bag on the bench of the locker room while he showers (a semi-public area), he does not, by doing so, relinquish his expectation of privacy concerning the contents of his gym bag. He has not abandoned the bag, he has only temporarily relinquished control of it.

For example, in, *United States v. Most*, 278 U.S. App. D.C. 6, 876 F.2d 191 (D.C. Cir. 1989), the defendant entered a grocery store carrying a bag. *Most*, 876 F.2d at 192. The store's policy was that customers were required to check their bags while they shopped. *Id.* Most asked one of the store clerks if she would watch his bag and the clerk placed the

bag on the floor underneath the checkout counter. In finding that Most had a legitimate expectation of privacy in his bag, the court wrote, "[A] person does not abandon his property whenever he temporarily relinquishes direct control over his belongings." *Most*, 876 F.2d at 196-97. As the court explained, "[t]he law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment." *See Most*, 876 F.2d at 197.

By contrast, "Warrantless seizure of property whose owner has abandoned it or requested another to destroy or get rid of it does not violate the fourth amendment." *State v. Bauer*, 127 Wis. 2d 401, 407 (Wis. Ct. App. 1985)

The question here, then, is not really whether Stewart has standing to challenge of the search of the trunk of his daughter's car, because the police did not just search the trunk of the car. They searched the bag that Stewart had put into the trunk of the car. The question is whether, under the totality of the circumstances, Stewart only temporarily relinquished control over the bag; or whether Stewart abandoned the bag.

There is simply no reason to believe that Stewart abandoned the plastic bag when he put it into the trunk of his daughter's car. It is an exceedingly common practice for air travelers to be picked up at the airport by family members. Given the parking restrictions, the family member pulls up to the terminal, pops the trunk open, the traveler puts his belongings into the trunk, and off they go. When the traveler arrives home, he takes his belongings back out of the trunk.

It might be a different matter if Stewart had put the bag into a garbage can, or into the trunk of a stranger's car. But that is not what occurred here.

Plainly, Stewart did not intend to abandon the plastic bag. He intended to only temporarily relinquish control over the object (the bag). He maintained a legitimate expectation of privacy in the contents of the bag. It is an expectation of privacy that is well-recognized; and, therefore, Stewart had standing to challenge the search and seizure of the bag.

Thus, even if the court were to examine the search of the bag independently of the issue concerning probable cause to arrest Stewart[3], Stewart has standing to challenge that search. If there was not probable cause to arrest Stewart, then there was not probable cause to search the bag.

II. At the time that Stewart was arrested, the police had no probable cause.

The first step in analyzing any Fourth Amendment issue is to determine whether any constitutionally protected interest was involved. Here, Stewart was physically moved away from the automobile, directed to the ground, and then handcuffed--all before the police ever even searched the white plastic bag. Thus, he was immediately under arrest. There plainly was no

[3]As mentioned earlier, it is conceptually possible to hold that the arrest of Stewart was unreasonable, but to not suppress the cocaine on the grounds that Stewart had no standing to challenge to seizure of the cocaine.

probable cause to arrest him at that point. The only "articulable fact" that the police possessed was the prediction of some criminal named "Black" that Stewart would be possessing cocaine at some point in the near future. Based on that prediction alone, the police arrested Stewart.

A. Standard of Appellate Review

Stewart does not challenge the trial court's findings of historical fact. Rather, the challenge is whether, under those facts, the officer had probable cause to arrest Stewart. Whether a search is reasonable is a question of constitutional fact, which the appellate court determines independently of the trial court's conclusion. *State v. Griffin*, 131 Wis. 2d 41, 62, 388 N.W.2d 535 (1986).

B. There was no probable cause to arrest Stewart

Three factors are relevant to the question of whether an arrest has occurred: (1) whether the person's liberty or freedom of movement is restricted; (2) whether the arresting officer intends to restrain the person; and (3) whether the person believes or understands that she or he is in custody. *State v. Washington*, 134 Wis.2d 108, 124-25, 396 N.W.2d 156, 163 (1986); *State v. Disch,* 129 Wis.2d 225, 236-37, 385 N.W.2d 140, 144-45 (1986). These factors are applied regardless of whether the arrest is challenged under the fourth amendment (Washington) or statutorily (Disch). Arrest hinges, in part, on

custody. The central idea of an arrest is the taking or detaining of a person by word or action in custody so as to subject his liberty to the actual control and will of the person making the arrest. *Huebner v. State*, 33 Wis.2d 505, 516, 147 N.W.2d 646, 651 (1967). Ultimately, whether a person has been seized is determined by an objective test; a person is seized only if, in view of all the circumstances, a reasonable person would have believed he was not free to leave. *Florida v. Royer*, 460 U.S. 491, 501-02 (1983); *State v. Kramar*, 149 Wis.2d 767, 781, 440 N.W.2d 317, 322 (1989).

Plainly, Stewart was arrested immediately upon the convergence of the police officers. There was a show of police force. Stewart was moved away from his vehicle and then he was “directed to the ground” and he was immediately handcuffed. The fact that Stewart may have exhibited "resistive tension" adds nothing to the analysis. Although resisting arrest is a crime, the officer must be acting lawfully when he attempts to place the person under arrest- that is, the officer must have probable cause to arrest.

The question, then, is whether there was probable cause to arrest Stewart. The standard is, of course, well-settled: probable cause for an arrest exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 267 Wis. 2d 531, 671 N.W.2d 660 (2003). "While the information must be

sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is 'more than a possibility,' it 'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" *Id.* To determine whether probable cause to arrest existed, the court must consider "the information available to the officer," including hearsay and "the collective knowledge of the officer's entire department." *Id.*

The reliability of Agent Gray's confidential informant is entirely irrelevant to the analysis. This is because the informant was nothing more than a conduit for Black's assertions that "a guy" (Stewart) would be coming from Las Vegas with cocaine. Black's bald claim that Stewart would be coming from Las Vegas with cocaine is woefully insufficient to establish probable cause to arrest Stewart as soon as he sets foot on Wisconsin soil. Who is safe, if all that the government needs to arrest someone is the say-so of a criminal that this someone plans to commit a crime at some future date? Do the police not have to at least consider the fact that Stewart might not have been able to get the cocaine; or that he might have changed his mind about coming to Milwaukee with the drugs? Is it too much to ask that the police actually *find* drugs before they arrest someone for possessing them?

This is precisely what occurred here. Black told the informant that Stewart planned to commit a crime at some time in the near future. The police waited until the appointed time

had arrived and then they arrested Stewart before they were in possession of any facts to suggest that Stewart had actually followed through with the alleged plan.

For these reasons, there was no probable cause to arrest Stewart at the point he was taken into custody.

Conclusion

It is respectfully requested that the Court of Appeals reverse the order of the trial court denying Stewart's motion to suppress evidence, permit Stewart to withdraw his guilty plea, and then remand the matter with instructions that the motion be granted.

Dated at Milwaukee, Wisconsin, this _____ day of January, 2011.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3583 words.

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Dated this _____ day of _____, 2010:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2010AP002553 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Little Al Stewart,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of trial court's bench decision on motion to suppress

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the

administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of January, 2011

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Jeffrey W. Jensen