COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1371-CR **Cir. Ct. No. 2004CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD M. JANIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: RICHARD DELFORGE, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Todd Janiak appeals a judgment of conviction for one count of armed burglary and two counts of second-degree recklessly endangering safety, along with an order denying his motion to suppress. Janiak

contends a search of the laundry room in his home was unconstitutional. We agree the search exceeded the permissible bounds of a search incident to an arrest and therefore reverse and remand with directions to grant the suppression motion.

Background

¶2 On January 31, 2004, the Oconto County Sheriff's Department was dispatched to James Sylvester's residence regarding a disturbance between Sylvester and a neighbor. The dispatcher advised that shots had been fired, children were involved or injured, and the neighbor was evidently returning to his home. Deputy Kevin Thomson believed, based on experience, that the neighbor was Janiak. As Thomson arrived on the scene, he pulled into Janiak's driveway just as Janiak was entering his home. Thomson ordered Janiak to stop, but he did not comply. Thomson approached the door, calling three times for Janiak to come out. Lieutenant Matt Morrisey arrived to assist Thomson, and the two officers entered the home and arrested Janiak in his living room. Thomson asked Janiak why he did not come out when instructed, and Janiak replied he was throwing his gloves away.

¶3 Thomson then did a quick sweep of adjacent rooms because a gun was allegedly used in the disturbance and Thomson was attempting to find and secure it. Thomson noticed a pair of gloves in a trash can in the laundry room, approximately ten to fifteen feet from where Janiak was arrested. Thomson later testified he believed Janiak was coming from that room as he and Morrisey entered. Thomson did not seize the gloves at that time.

¶4 Morrisey read Janiak his ***Miranda***[1] rights and Janiak answered a few questions. Morrisey then went to search the laundry room. He seized the gloves, which Thomson had reported, from the trash can. Morrisey also discovered and seized, from a closed dog food bag near the trash can, seven 12-gauge shotgun shells and books of matches in a plastic bag.

¶5 Janiak was initially charged with one count of armed burglary and one count of attempted first-degree intentional homicide. An Information later charged him with four additional counts. Janiak filed a motion to suppress the evidence Morrisey had obtained, arguing the items had been seized during an invalid, warrantless search. The court denied the motion, concluding the search was valid as incident to a lawful arrest.

¶6 An amended Information was subsequently filed, again with six total charges. Janiak entered an ***Alford***[2] plea to one count of armed burglary and two counts of second-degree recklessly endangering safety. On the armed burglary, Janiak was sentenced to twelve years, consisting of seven years' initial confinement and five years' extended supervision. For each of the endangering safety counts, Janiak received two years' initial confinement and three years' extended supervision. Each of the three sentences were to be served consecutively.

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

[2] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

Discussion

¶7 When we review a circuit court's ruling on a motion to suppress, we uphold the court's factual findings unless clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Whether a search or seizure passes constitutional muster is a question of law we review de novo. ***Id.***

¶8 The Fourth Amendment bars only unreasonable searches and seizures. ***Maryland v. Buie***, 494 U.S. 325, 331 (1990). Warrantless searches and seizures inside a home are presumptively unreasonable. ***State v. Kryzaniak***, 2001 WI App 44, ¶15, 241 Wis. 2d 358, 624 N.W.2d 389. Warrantless searches are, nevertheless, occasionally permitted, "'subject to a few carefully delineated exceptions' that are 'jealously and carefully drawn.'" ***Id.***, ¶14 (citations omitted).

¶9 One of the exceptions is a search incident to a lawful arrest. But a search incident to arrest "has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest." ***Chimel v. California***, 395 U.S. 752, 759 (1969) (citation omitted).

¶10 Thus, it is reasonable for officers to search an arrestee's person and area "within his immediate control" to prevent the suspect from grabbing either a weapon to use against officers or evidentiary items to be destroyed. ***Id.*** at 763. It is also reasonable for officers to conduct a protective sweep of a home to determine if others might be present, "look[ing] in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." ***Buie***, 494 U.S. at 334.

> There is no comparable justification, however, for routinely searching any room *other than that in which an*

> *arrest occurs*—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

Chimel, 395 U.S. at 763 (footnote omitted) (emphasis added).

¶11 We therefore conclude Morrisey's search of Janiak's laundry room was unreasonable. He did not search the room in which Janiak was arrested. At the time Morrisey conducted his search, it was not protective in nature, as Thomson had already confirmed the house was clear and no weapon was within Janiak's reach.[3] Further, the laundry room was not within Janiak's "immediate control." Rather, it was ten to fifteen feet from where he was arrested—close, but not within arm's reach.[4]

¶12 When Morrisey searched the laundry room, he not only searched the trash and retrieved the gloves Thomson had noted earlier,[5] but also searched a closed dog food bag to uncover evidence. ***Chimel*** instructs that closed or

[3] Janiak does not challenge Thomson's initial protective sweep.

[4] This case is therefore distinguishable from ***State v. Fry***, 131 Wis. 2d 153, 388 N.W.2d 565 (1986), and ***State v. Murdock***, 151 Wis. 2d 198, 445 N.W.2d 319 (Ct. App. 1989), *aff'd*, 155 Wis. 2d 217, 455 N.W.2d 618 (1990). The court in ***Fry*** had stated that the "validity of a search incident to arrest is determined by … whether the search was limited to an area from which the defendant might gain possession of a weapon or evidentiary items." ***Fry***, 131 Wis. 2d at 170. Thus, in ***Fry***, a search of a vehicle's passenger compartment was permissible incident to arrest because the entire interior was accessible to the arrestee. In ***Murdock***, the defendant was arrested in an approximately twelve-by-fourteen-foot room in a boarding house. Contiguous to the room was a small pantry or closet, open to the larger room, and within four feet of the defendant at the time of his arrest. ***Id.*** at 200. We thus upheld a search of the closet because the area was within Murdock's "reach at the time of his arrest." ***Id.*** at 204. However, nothing about this case suggests that Janiak's laundry room was within his reach at the time of his arrest.

[5] Neither party has offered an opinion as to whether Thomson could have taken the gloves during his protective sweep as evidence in plain view.

concealed containers in the room of the arrest may not be searched absent a warrant or valid exception. It therefore follows that searching a closed container in a room other than the one where arrest occurs is similarly impermissible absent a warrant or valid exception. Because the laundry room was not easily accessible by Janiak, the closed food bag was even less so and there was no justification for searching it.

¶13 The evidence obtained from the search of the laundry room, including the gloves and the contents of the dog food bag, is therefore tainted by constitutional error. The judgment and order are reversed and we remand with directions to grant the motion to suppress.[6]

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[6] We reject Janiak's argument that the search was invalid because it was not contemporaneous with his arrest. There is no requirement the search be *immediately* preceded by an arrest, and it appears the officers were at Janiak's home for no more than twenty-five minutes.