COURT OF APPEALS
DECISION
DATED AND RELEASED

June 24, 1997

NOTICE

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No. 96-3697-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES E. JANSSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. James Janssen appeals a judgment of conviction for first-degree intentional homicide in violation of § 940.01, STATS., entered after a jury found him guilty of the murder of his wife, Danica Janssen. He contends that the trial court erred when it declined to suppress both the fruits of search warrants as well as his statements to police. He argues that the challenged

evidence was tainted by an earlier warrantless entry and search of his residence immediately after the police found his wife's unclothed body nearby. He argues, alternatively, if the entry and initial search was valid, the police exceeded the scope of a valid search when they read a note lying on the kitchen table. The State maintains that the initial entry to the home was justified by exigent circumstances and that reading the note in plain view did not constitute a "search" in the constitutional sense. We concur with the State's contentions and affirm the judgment.

FACTUAL BASIS FOR WARRANTLESS ENTRY

Janssen does not dispute the trial court's factual findings relating to the basis for the sheriff's warrantless entry to the home. He relies instead upon additional testimony given at the suppression hearing as support for his claim that the initial entry and search was unconstitutional. We therefore include in our summary of relevant facts both the court's findings and other unchallenged evidence relating to the initial entry.

Deputies Gary Schmidt and Michael Schuster of the Vilas County Sheriff's Department responded to a call to investigate a homicide in the Town of Conover sometime after 2 p.m., October 8, 1992. They found the deceased female victim of obvious foul play alongside a rural dirt road in Conover. Several town highway workers were also present. Schmidt believed the victim to be Danica Janssen, the ex-wife of the defendant. Schuster learned the victim may have "lived at the top of the hill with several children alone," about 200 yards directly up the road. When he reached the house, Schuster observed the lights on inside and out even though it was broad daylight. No children were in view, and the front door of the home was ajar. An unoccupied car was parked outside the home,

its door also ajar. Schuster entered the house with his weapon drawn. He observed a family portrait on the wall of the living area and believed he recognized the victim in the photo. He then observed another photo of Danica on the kitchen table along with a note lying next to it that he testified was open and in plain view. The note, according to an affidavit prepared later for the challenged search warrant, stated that there had been an argument for which the writer apologized, and stating that "they had overslept" and that the writer was taking the children to school in the car. After a period of one and one-half to two minutes into Schuster's sweep of the ground floor of the home, he thought he heard voices in the basement area. He immediately backed out and radioed for assistance.

Schmidt responded, and he and Schuster discussed the need to look for potential victims in need of assistance. They then entered the home, weapons drawn, "made a sweep of every room," and were "providing cover for one another." They discovered that the basement voices originated from a radio. They described the basement as cluttered and checked under clothing and bedding material to determine if there were any people there. Schmidt also saw the photo and read the note on the kitchen table. They were in the house "three to five minutes at the most." Janssen's motion to suppress the evidence and his statements based upon an invalid warrantless entry and search was denied by the trial court. The jury convicted Janssen after this evidence was used at trial.

EXIGENT CIRCUMSTANCES EXCEPTION TO SEARCH WARRANT REQUIREMENT

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The standards and principles of the constitutional law of search and seizure recognized under art. I, § 11 of the Wisconsin Constitution conform to the law developed by the United States Supreme Court's interpretation of the Fourth Amendment. ***State v. Guy,*** 172 Wis.2d 86, 93, 492 N.W.2d 311, 313 (1992). Searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established exceptions that are "jealously and carefully drawn." ***Coolidge v. New Hampshire,*** 403 U.S. 443, 454-55 (1971). The burden is upon those who seek exemption from the search warrant requirement to show that the exigencies of the situation made that course imperative. ***Id.*** at 455. The law recognizes an exigent circumstances exception to the Fourth Amendment search warrant requirement; an exigency may exist where there is a threat to the safety of others. *See* ***State v. Kiper,*** 193 Wis.2d 69, 90, 532 N.W.2d 698, 708 (1995). The law requires that the searching officer must be motivated by a perceived need to render aid or assistance to potential victims, and the reviewing court must be able to conclude that a reasonable person under the circumstances would have believed that an emergency existed. ***State v. Prober,*** 98 Wis.2d 345, 365, 297 N.W.2d 1, 12 (1980), *overruled on other grounds*, ***State v. Weide***, 155 Wis.2d 537, 455 N.W.2d 899 (1990).

State v. Boggess, 115 Wis.2d 443, 452, 340 N.W.2d 516, 522 (1983), describes the test for a determination of the objective reasonableness of the claim of an emergency search:

> We hold that the objective test of the emergency rule is satisfied when, under the totality of circumstances, a reasonable person would have believed that: (1) there was an immediate need to provide aid or assistance to a person due to actual or threatened physical injury; and (2) that immediate entry into an area in which a person has a reasonable expectation of privacy was necessary in order to provide that aid or assistance.

When we review a trial court's suppression ruling, that court's findings of fact will be upheld unless they are clearly erroneous, but whether those facts satisfy the constitutional requirement of reasonableness presents a question of law for independent review. ***State v. Jackson,*** 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989).

Janssen concedes that the trial court's finding of fact that the officers' entry to search the home was subjectively motivated to render aid to potential victims is beyond challenge under the clearly erroneous standard. We therefore proceed to address his contention that the evidence does not satisfy the objective prong of the test, that is, that a reasonable person under all the circumstances would not have believed there was a threat of physical injury to anyone who may be on the premises.

The trial court's findings and other undisputed facts surrounding the initial entry supports a conclusion that the initial entry to search the premises was reasonable. Danica Janssen's nearly nude body was found within 200 yards of her home. The road on which she was found led directly to her home. The sheriff had information that she lived in the home with her children, and no children were immediately apparent in the vicinity. The home's lights were on in mid-afternoon and the door ajar. These circumstances demonstrate a proper foundation for an emergency entry to the residence.

PLAIN VIEW DOCTRINE WHERE NO "SEARCH" OCCURS

Janssen argues further that even if the initial entry were justified, the officers' stop to read the note on the kitchen table exceeded the scope of any emergency search. The State contends that where the note was in plain view and remained untouched, the officers' act of reading it did not constitute a search.

Initially, where a search and seizure does occur without a warrant and the State claims a plain view exception, three criteria must be met:

> (1) the evidence must be in plain view;
> (2) the officer must have prior justification for being in the position from which [he or] she discovers the evidence in "plain view";
> (3) the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and the criminal activity."

Guy, 172 Wis.2d at 101-02, 492 N.W.2d at 317 (quoting ***State v. Washington***, 134 Wis.2d 108, 121, 396 N.W.2d 156, 161 (1986)).

However, the third requirement, the presence of probable cause, is only relevant where there is a search and seizure in the constitutional sense. In circumstances where there is truly only a "cursory inspection," that is, one that involves merely looking at what is already exposed to view, without disturbing it, is not a "search" for Fourth Amendment purposes and therefore does not even require reasonable suspicion, let alone probable cause. ***Arizona v. Hicks,*** 480 U.S. 321, 328 (1987). In other words, if there is no search and seizure, the officer need only show a prior justification for being in position to see the disputed evidence, and that evidence must also be in "plain view." If these conditions are met, there

is no Fourth Amendment violation.[1] We conclude that this is the situation in the case before us now.

We have already determined the justification for the entry to the home under the exigent circumstances exception to the warrant requirement. We reached our determination based upon our conclusion of law of an objective reasonable police perception of an emergency and the trial court's finding of a subjective actual belief of an emergency with respect to the victim's children.[2] With these determinations as a premise, we also conclude that the note was in plain view. First, the trial court found as a fact that the note was in plain view, "on top of the table in the kitchen area … not hidden nor partially covered. The officers were not required to move or position either the note or the photograph in order to clearly see them. There was no object otherwise obstructing the view of the note and the photograph." Second, we also conclude that the note was in plain view in the constitutional sense. The officers were not required to divert their eyes from what was open and unobstructed. As the trial court observed: "It would defy logic and common sense to require officers to wear blinders so that they see only that which they are specifically looking for."

[1] An argument could be made that there was probable cause to believe the note was evidence of homicide. The note included an apology for an argument and, in light of all the surrounding circumstances, could reasonably be evidence of the crime under investigation. Because we conclude that there was no Fourth Amendment search, we do not have to address the issue of probable cause.

[2] There were two entries to the home, one by Schuster and a second by Schuster accompanied by Schmidt. The second entry was on no different footing from the first, in light of Schuster's temporary withdrawal when he heard voices in the basement. The second search was merely an extension of the first allowing Schuster to provide for a safe search for potential victims.

Numerous cases uphold as a plain view exception evidence that involves the use of the officer's senses to observe it. Only a few examples suffice. In ***Minnesota v. Dickerson,*** 508 U.S. 366 (1993), a "plain feel" of illegal contraband was upheld when it was discovered in the course of a valid pat down search for weapons during a ***Terry*** stop.[3] In ***Trupiano v. United States,*** 334 U.S. 699, 704 (1948), *overruled on other grounds*, ***United States v. Rabinowitz***, 339 U.S. 56 (1950), a federal officer validly on the owner's farm with consent visually observed an illegal still in operation through an open doorway.

Nor do we consider the fact that the officer momentarily stopped to read the contents of the brief note sufficient to declare the contents outside the protection accorded under the plain view doctrine. The written contents of the note were openly visible to the casual observer and involved no further physical intrusion into the owner's property or privacy than was already justified by the emergency.

We are convinced that the mere act of reading what is validly in plain sight of the officer is not a search in the constitutional sense. We are so persuaded by the language and reasoning of the United States Supreme Court in ***Hicks.*** In that case, officers lawfully made a warrantless entry to an apartment after someone inside had shot through the floor and injured a man in the apartment below, and they were searching for the shooter, for other victims and for weapons. One of the policemen then noticed two sets of expensive stereo components, which seemed out of place in the squalid apartment. The officer read and recorded

[3] ***Terry v. Ohio,*** 392 U.S. 1 (1968), validating a temporary stop based upon an articulable suspicion less than probable cause necessary for arrest, and a pat down for weapons if justified by the circumstances.

the serial numbers, moving some of the components to do so. ***Id.*** at 323. The ***Hicks*** court rejected the government's plain view argument, holding that the officer's *moving of the equipment* constituted a separate "search" apart from the search for the shooter and weapons that was the subject of the lawful objective of the entry to the apartment. ***Id.*** at 324. In disagreement with Justice Powell's dissent, the majority held that the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. ***Id.*** at 325. We read this language in ***Hicks,*** coupled with that court's reference to the exclusion of a "cursory inspection," as a "search" as consistent with our conclusion that the action of Schuster and Schmidt was not a search either. The reading of the note was merely a cursory inspection as described in ***Hicks***.

Janssen's challenge to the evidence seized by search warrants and his additional challenge to the admissibility of his statements to police is premised solely upon the "fruit of the poison tree" doctrine first pronounced in ***Wong Sun v. United States,*** 371 U.S. 471 (1963). Because there was no poison tree in this case, there was no poison fruit. We therefore affirm the judgment of conviction for murder.

By the Court.—Judgment affirmed.

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