COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2304-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRYSTAL PORTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Crystal Porter appeals from a judgment of conviction entered on her guilty plea to keeping or maintaining a drug house, contrary to WIS. STAT. § 961.42(1) (1999–2000), and from an order denying her

request for postconviction relief.[1] Porter claims: (1) she did not voluntarily consent to the warrantless entry into and subsequent search of her residence by police, and thus, the trial court erred in denying her motion to suppress the evidence seized from the house; (2) WIS. STAT. § 961.42 is unconstitutionally vague, ambiguous and overbroad; and (3) the complaint did not set forth sufficient facts to support Porter's guilty plea.[2] We affirm.

I. BACKGROUND

¶2 While on patrol, two police officers observed a man whom they believed was breaking into the trunk of a car. When the officers approached, the suspect fled but left the trunk open. Police saw two garbage bags filled with what they believed to be marijuana inside the trunk. The suspect ran into Porter's residence, and the officers followed. Police knocked on the door and Porter answered. She gave the police permission to enter and to search for the fleeing suspect, whom they found in the house and arrested.

¶3 Approximately thirty to forty minutes later, the police returned with Vice Control Division Detective Andre Matthews. Detective Matthews knocked on the door, which Porter again answered. Detective Matthews asked for her permission to enter the residence and discuss whether drugs or other contraband were inside. Although Porter "vehemently" denied any involvement with drugs and "hemmed and hawed," she agreed to let the police inside the house. According to Detective Matthews, once inside the house, Porter led him through two "living room area[s] and then into the kitchen," where he spoke to Porter

[1] All further references to the Wisconsin Statutes are to the 1999–2000 version.

[2] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(10).

alone while the other officers stayed in one of the living rooms. Detective Matthews asked Porter for permission to search the house for drugs while in the kitchen, and according to the detective, "[s]he said yes, she would allow me to search for marijuana and contraband. As a matter of fact, she signed my memo book in regards to that."

¶4 Porter's recollection of how she and Detective Matthews ended up in the kitchen and what occurred in the kitchen, however, is substantially different from the detective's. According to Porter, she repeatedly told the police to stay in the living room. She claimed they agreed to her request. Nevertheless, Detective Matthews ignored her request to stay in the living room, told her that he wanted to speak with her privately, and she then followed him into the kitchen. According to Porter, she gave the detective permission to search for drugs because she felt threatened by Detective Matthews, who, she claimed, would not let her leave the kitchen and "said that if I did not let them search the house, then they would come back with a warrant and they would wreck my stuff." Porter also said she gave permission because she "really did not believe that there were any drugs in the house." The police searched Porter's residence and found drugs and contraband.

¶5 The trial court denied Porter's motion to suppress evidence. The trial court determined that Porter had voluntarily consented to the second police entry into the house.[3] In addition, it determined that Porter had voluntarily consented to the search while she was in the kitchen, noting that while Detective Matthews was told by Porter to stay in the living room, "there is no indication with respect to any denial on [Porter's] part to acquiesce with the detective's request for

[3] Porter does not challenge the first police entry.

a private discussion [in the kitchen]." After the court denied her suppression motion, Porter pled guilty. She then brought a post-conviction motion, which was also denied.

II. DISCUSSION

A. Consent.

¶6 Porter claims that she did not voluntarily consent to the warrantless entry into and subsequent search of her residence by police, and thus, the trial court erred in denying her motion to suppress the evidence seized pursuant to the search. "The Fourth Amendment to the United States Constitution and Art. I, § 11, of the Wisconsin Constitution both protect against unreasonable searches and seizures." ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794, 801 (1998). Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967) (footnotes omitted). One such exception is consent. ***Id.***, 389 U.S. at 358 n.22.

¶7 When the justification of a warrantless search rests on consent, the State bears the burden to prove by clear and convincing evidence that the defendant voluntarily consented. ***Phillips***, 218 Wis. 2d at 197, 577 N.W.2d at 802; see ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542, 543 (1971) (State bears "the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied"). "Whether consent was given and the scope of the consent are questions of fact that we will not overturn unless clearly erroneous." ***State v. Garcia***, 195 Wis. 2d 68, 75, 535 N.W.2d 124, 127 (Ct. App. 1995). The legality of a search, including whether a person's consent for a

warrantless search is voluntary, however, are matters that we review *de novo*. ***Phillips***, 218 Wis. 2d at 191-195, 577 N.W.2d at 799-801.

¶8 To determine whether Porter voluntarily consented in this case, we must engage in a two-step analysis. ***Id.***, 218 Wis. 2d at 196–197, 577 N.W.2d at 802. First, we must determine whether Porter, in fact, consented to the search. ***Id.*** Next, we examine whether her consent was voluntarily given. ***Id.***, 218 Wis. 2d at 197, 577 N. W.2d at 802. "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." ***Id.*** We conclude that the record supports the trial court's determination that Porter voluntarily consented to both the police officers' entry into and subsequent search of her residence, and that her consent was not the result of police coercion.

1. Entry into House.

¶9 Porter first argues that she did not consent to the entry of police into the house. We disagree. The record supports the trial court's finding that Porter voluntarily consented to the police entry into her residence. While Porter reluctantly consented, Porter does not specifically identify what was said or done by the officers to constitute illegal police coercion in connection with the entry. At the suppression hearing, Porter testified that the officers said: "They'd just, you know, ask a few questions and be on their way, and I like said okay. So I let them come into the house."

2. Consent to Search.

¶10 Porter next argues that Detective Matthews' movement from the living room into the kitchen was improper, and that although she acquiesced to the search of the house, consent cannot be based on mere acquiescence. ***State v.***

Johnson, 177 Wis. 2d 224, 234, 501 N.W.2d 876, 880 (Ct. App. 1993) ("Consent 'cannot be found by a showing of mere acquiescence.'") (quoted source omitted). As the State cogently points out, however, Porter's argument "is largely premised on her own testimony" and "overlooks the fact that the trial court found the contrary testimony of Detective Matthews to be 'credible and reliable.'" The trial court believed that Porter followed Detective Matthews into the kitchen and, by not denying that she acquiesced, agreed to speak with him privately. The trial court opined:

> [T]here is no indication with respect to any denial on [Porter's] part to acquiesce with the detective's request for a private discussion [in the kitchen].
>
> So in that sense, I do not find that the actions of the detective in leaving the living room were inappropriate or improper.

By finding nothing "inappropriate or improper," the trial court essentially determined that Porter agreed to go into the kitchen with Detective Matthews. ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498, 501 (Ct. App. 1984) (where trial court had opportunity to weigh the credibility of witnesses but failed to make express finding necessary to support its legal conclusion, an appellate court can assume trial court made the finding in way that supports trial court's decision); *see also* ***Phillips***, 218 Wis. 2d at 197, 577 N.W.2d at 802 ("Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct.").

¶11 Moreover, the trial court concluded that the police employed "no intimidation or threat" to obtain Porter's consent. Indeed, Detective Matthews denied threatening Porter and the trial court believed him. Additionally, the trial court remarked, "[i]n [Porter's] mind, there were no drugs in the house" and concluded, "because she felt she had nothing to hide," Porter was more likely to

have voluntarily consented to the search. The trial court's findings of fact are not clearly erroneous. *See* ***Garcia***, 195 Wis. 2d at 75, 535 N.W.2d at 127 ("Because the trial court is the sole judge of credibility, this court will not reverse a credibility determination unless we could conclude, as a matter of law, that no finder of fact could believe the testimony."). Accordingly, under the totality of the circumstances, the trial court properly concluded that Porter voluntarily consented to the search of her home.

B. Constitutionality of WIS. STAT. § 961.42.

¶12 Next, Porter argues that WIS. STAT. § 961.42(1) is unconstitutionally vague, ambiguous and overbroad.[4] Section 961.42(1) provides:

> **Prohibited acts B—penalties. (1)** It is unlawful for any person knowingly to keep or maintain any … dwelling, building … or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for manufacturing, keeping or delivering them in violation of this chapter.

The construction of a statute involves a question of law, which we review *de novo*. ***State v. Ambrose***, 196 Wis. 2d 768, 776, 540 N.W.2d 208, 211 (Ct. App. 1995). "The purpose of statutory interpretation is to discern the intent of the legislature." ***State v. Setagord***, 211 Wis. 2d 397, 406, 565 N.W.2d 506, 509 (1997). Porter must prove that the statute is unconstitutional beyond a reasonable doubt. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115, 121 (1995). "Statutes are presumed

[4] Porter first challenged the constitutionality of WIS. STAT. § 961.42(1) in her postconviction motion. Porter's postconviction motion also alleged that trial counsel was ineffective for not challenging the constitutionality of WIS. STAT. § 961.42(1), and ultimately sought to have the charge dismissed or to withdraw her guilty plea. The trial court did not discuss the merits of her constitutional challenge, holding: "[T]he court finds no basis for dismissal on these grounds," and that counsel's failure to challenge either the complaint or the statute's constitutionality "does not undermine confidence in the outcome."

constitutional, and this court must indulge every presumption favoring the validity of the law." ***State v. Armstead***, 220 Wis. 2d 626, 638, 583 N.W.2d 444, 449 (Ct. App. 1998). Porter has not proved that WIS. STAT. § 961.42(1) is unconstitutional beyond a reasonable doubt. We address each of Porter's challenges in turn.

1. Overbreadth.

¶13 In an undeveloped argument, Porter claims that WIS. STAT. § 961.42(1) is unconstitutionally overbroad. A statute is overbroad "when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate.'" ***State v. Konrath***, 218 Wis. 2d 290, 304-305, 577 N.W.2d 601, 607 (1998) (quoted source omitted). The State, however, correctly points out that the overbreadth doctrine is limited to the "context of the First Amendment." ***United States v. Salerno***, 481 U.S. 739, 745 (1987). Porter does not connect her argument to a First Amendment violation. Accordingly, we reject her overbreadth challenge to WIS. STAT. § 961.42(1).

2. Vagueness.

¶14 Next, Porter contends that WIS. STAT. § 961.42(1) is unconstitutionally vague because it does not provide adequate notice and the "resorted to by persons" language should exclude those "persons" living in her residence.

> Before a court can invalidate a criminal statute because of vagueness, it must conclude that, because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition and those who enforce the laws and adjudicate guilt lack objective standards and may operate arbitrarily.

State v. Pittman, 174 Wis. 2d 255, 276, 496 N.W.2d 74, 83 (1993). "The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] ... conduct comes near the proscribed area.'" ***Id.*** (quoted source omitted). "The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards." ***Id.***

¶15 WISCONSIN STAT. § 961.42(1) is not unconstitutionally vague. The statute is quite clear as to the conduct it prohibits, thus providing sufficient notice to Porter. Moreover, the police found a substantial quantity of marijuana at Porter's residence, and Porter told the police that "her *friends* come to her apartment and smoke marijuana." (emphasis added). Thus, even under Porter's construction of the statute—that it should exclude persons living with her—her conduct still falls within § 961.42(1). Because Porter's conduct clearly falls within the scope of § 961.42(1), she may not challenge the statute as unconstitutionally vague. ***State v. Clement***, 153 Wis. 2d 287, 295-296, 450 N.W.2d 789, 792 (Ct. App. 1989) ("A party whose conduct is clearly proscribed by the statute in question does not have standing to challenge it on the grounds of being vague as it may be applied to others.").

3. Ambiguity.

¶16 Porter also claims that WIS. STAT. § 961.42(1) is impermissibly ambiguous, arguing that "reasonably informed persons disagree on the 'resorted to' language in the statute." Porter, however, essentially rehashes her prior argument that the "resorted to by persons" language contained in § 961.42(1) could be easily interpreted to exclude persons living in the house. As we have

already noted, Porter's conduct satisfies even her own interpretation of the statute. Accordingly, we reject her argument.

C. Sufficiency of the Complaint.

¶17 Finally, Porter claims that the criminal complaint does not set forth sufficient facts to support Porter's guilty plea, and therefore, the trial court erred by not allowing her to withdraw her plea. ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 727, 605 N.W.2d 836, 843 (failure to establish a sufficient factual basis for the crime to which the defendant is pleading guilty constitutes a manifest injustice warranting post-sentencing plea withdrawal). "The sufficiency of a complaint is a matter of law that we review *de novo*." ***State v. Manthey***, 169 Wis. 2d 673, 685, 487 N.W.2d 44, 49 (Ct. App. 1992). When a trial court finds sufficient factual basis to support a guilty plea, we will not upset that finding "unless it is contrary to the great weight and clear preponderance of the evidence." ***State v. Higgs***, 230 Wis. 2d 1, 11, 601 N.W.2d 653, 658 (Ct. App. 1999).

¶18 WISCONSIN STAT. § 971.08(1)(b) directs that before accepting a guilty plea, the trial court must ascertain that the defendant "in fact committed the crime charged." The trial court used the complaint as a factual basis for Porter's guilty plea. Porter argues that the complaint fails to set forth facts supporting the "keep or maintain" element, as well as the "for the purpose of illegally using drugs" element contained in WIS. STAT. § 961.42(1). We disagree. In order to be constitutionally sufficient, a complaint must set forth "'the essential facts' constituting the offense charged." ***Ritacca v. Kenosha County***, 91 Wis. 2d 72, 83, 280 N.W.2d 751, 757 (1979) (quoted source omitted). Here, the complaint provided a sufficient factual basis to support Porter's guilty plea. Regarding the "keep or maintain" element, the criminal complaint alleged that Porter answered

the door, let the police in, and referred to the residence as "her apartment." Regarding the "for the purpose of illegally using drugs" element, the complaint alleged that Porter admitted to the police that "her friends come to her apartment and smoke marijuana," and although she did not approve of the daily use of marijuana in her apartment, "she [did] not feel she could stop her friends from doing so." The allegations contained in the criminal complaint are sufficient to establish the elements challenged by Porter. Thus, the trial court reasonably concluded that Porter's guilty plea was supported by a sufficient factual basis.

By the Court.—Judgment and order affirmed.

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