COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1234-CR **Cir. Ct. No. 02CF000196**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. SYKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 ANDERSON, P.J. Michael D. Sykes appeals from a judgment of conviction for second or subsequent offense possession of cocaine with intent to

deliver contrary to WIS. STAT. §§ 961.41(1m)(cm)1 and 961.48(1) (2001-02).[1] We affirm on grounds other than those relied on by the trial court.

¶2 *Facts*. The relevant facts are undisputed.[2] After his arrest, Sykes filed two motions to suppress. In his first motion, Sykes argued that the court lacked personal jurisdiction over him because he had been brought before the court pursuant to an illegal arrest. He claimed that the officers entered the apartment without consent of the person in lawful possession and without probable cause and that the officers lacked consent to open his wallet. He asked the court to suppress the "illegal arrest" and the physical evidence obtained as a result, as well as any statements he made after his arrest. In his second motion, Sykes asked the court to suppress any and all physical evidence because the search and seizure of such evidence were in violation of his constitutional rights.

¶3 A motion hearing was held on September 16, 2002. The court heard testimony from the apartment renter, Stacy Hudson, the owner and landlord, William Downham, and the officers at the scene, Officer Kenneth Kluck and Lieutenant Thomas Horvath.

¶4 At some time prior to July 6, 2001, Downham called Hudson to tell her about suspicious people and activities in her apartment. Hudson told Downham that she did not want people in the apartment and wanted them to leave.

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] For the purposes of this appeal, the facts have, for the most part, been gleaned from the State's brief. Sykes did not provide citations to the record to corroborate the facts set out in his briefs. Such failure is a violation of WIS. STAT. RULE 809.19(1)(d) and (3) of the rules of appellate procedure, which requires parties to set out facts "relevant to the issues presented for review, with appropriate references to the record."

Hudson then granted Downham's request for permission to enter the apartment and change the locks.

¶5 Downham arranged for a locksmith to come to the apartment on July 6, 2001. Downham also asked law enforcement to have an officer present when the locks were changed. Consequently, on July 6, 2001, Horvath dispatched Kluck to accompany Downham while he changed the locks. Horvath advised Kluck to call for more officers if he came into contact with unwanted persons who might be in the apartment.

¶6 While Kluck and Downham waited for the locksmith to arrive at the apartment building, Downham informed Kluck that no one was supposed to be in the apartment other than the renter, Hudson. Downham told Kluck that people "had been in there" who the renter did not want to be there and that is why he was changing the locks.

¶7 After the locksmith arrived, Downham and Kluck knocked on Hudson's apartment door. No one answered their knocks. After the locksmith started working to open the lock, a woman inside the apartment opened the door. When Kluck asked the woman what she was doing there, she tried to close the door, but Kluck put his foot against the door. The woman continued to push against the door saying, her "man was naked." Kluck told her: "That's all right, I have seen naked men before." After that, the woman left the door ajar and ran down the hall of the apartment and into the bathroom where she slammed the door behind her.

¶8 After entering the apartment, Kluck heard the toilet flushing. The bathroom door then opened and the woman came out. Kluck said that besides this woman, there were several other people in the living room. He decided to stay in

the living room and to call for backup. Kluck said he had the female subject and Sykes sit down. Kluck said his reason for detaining them and calling for backup was: "As far as I knew they weren't supposed to be there. And were there illegally."

¶9 A short time after calling for backup, Officers Horvath and Wegner arrived at the scene. Horvath testified that from the information he had at the time, he believed that the people in the apartment were not supposed to be in the apartment and that—because of reports to the landlord that people were coming and going at all hours and staying only briefly—there was possible drug activity taking place.

¶10 After getting a brief review from Kluck of what had occurred, Horvath asked Sykes if he had any identification. Sykes said, "[N]ot on him but he had it in his wallet." He then asked him where his wallet was. Sykes told Horvath his wallet was in the living room area lying underneath an elevated cedar chest. Horvath said Sykes pointed at his wallet lying under the chest.

¶11 After Sykes pointed out where his wallet was to Horvath, Horvath said:

> I went and got the wallet where he advised me that it was. I double checked and said, "Is this your wallet," and [Sykes] said it was. And I double checked, asked if the identification was in the wallet, he said it was.
>
> I opened the wallet to look for identification, and immediately found a baggie that I pulled out that I believed to be crack cocaine.

After the crack cocaine was found in the wallet, Sykes was arrested.

¶12 At the end of the hearing, the trial court denied Sykes' suppression motions. The court concluded that the police lawfully entered the apartment. The court concluded the following in regard to the search of Sykes' wallet and the seizure of the crack cocaine:

> As to the items found in the wallet, Lieutenant Horvath, at that time Sergeant Horvath, was making in my judgment an investigatory stop per se or, pat down, which he had a right to do under the circumstances to obtain the identity of the people in the apartment. The only reason he went to the item on the floor, the wallet, was because he was directed there by [Sykes] in response to the question: Do you have any identification. He is entitled to ask for identification.
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> I think the items located within the wallet were located, in effect, in plain view while the officer was attempting to ascertain the identity of the Defendant, which he had lawful reason to do.

¶13 Sykes appeals from the judgment of conviction to challenge the denial of his suppression motions.

¶14 *Law*. Sykes' motions to suppress any and all statements and/or physical evidence were based primarily on the Fourth and Fourteenth Amendments to the United States Constitution, and article I, section 11 of the Wisconsin Constitution. The Fourth Amendment to the United States Constitution guarantees that "[t]he 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." The Wisconsin Constitution provides a nearly identical protection in article I, section 11. ***State v. Murdock***, 155 Wis. 2d 217, 226-27, 455 N.W.2d 618 (1990). Therefore, Wisconsin courts have "consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the United States Supreme Court under the fourth amendment." ***Id.*** at 227 (citation omitted). It is

well established that the Fourth Amendment does not prohibit all searches and seizures but only those that are unreasonable. ***Id.***

¶15 Reasonableness is determined by balancing "the public interest and the individual's right to personal security free from arbitrary interference by law officers." ***Hiibel v. Sixth Judicial Dist. Court ex rel. County of Humboldt***, 59 P.3d 1201, 1203 (Nev. 2002) (citations and footnote omitted), *cert. granted*, 124 S. Ct. 430 (U.S. Oct. 20, 2003) (No. 03-5554). Considerations involve the "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." ***Id.*** (citations and footnote omitted). A primary concern is "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." ***Id.*** (citations and footnote omitted).

¶16 The constitutional validity of a search and seizure raises a question of constitutional fact. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. When a defendant moves to suppress evidence, the circuit court "considers the evidence, makes findings of evidentiary or historical fact, and then resolves the issue by applying constitutional principles to those historical facts." ***Id.*** (citation omitted). We review a circuit court's denial of a motion to suppress in two steps. ***Id.*** We examine the circuit court's findings of historical fact under the clearly erroneous standard and then review de novo the application of constitutional principles to those facts. ***Id.***

¶17 However, the question of whether those facts constitute probable cause is a question of constitutional fact, which we review independently of the trial court's holding. ***State v. Mata***, 230 Wis. 2d 567, 570, 602 N.W.2d 158 (Ct.

App. 1999). The question of probable cause turns on the facts of the particular case. ***Id.*** at 572. Our supreme court has instructed that whether there is probable cause depends on "the particular circumstances," the "totality of the circumstances," and "the quantum of evidence" perceived by the police. ***Id.*** (citing ***State v. Secrist***, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999)).

¶18 When analyzing probable cause to search, "the proper inquiry is whether evidence of a crime will be found. The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***State v. Erickson***, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407 (citation omitted), *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 101 (Wis. Apr. 22, 2003) (No. 01-3367-CR). Whether probable cause for a search exists is determined by analyzing the totality of the circumstances. ***Id.*** "The test is objective: what a reasonable police officer would reasonably believe under the circumstances." ***Id.*** (quoting ***State v. Londo***, 2002 WI App 90, ¶10, 252 Wis. 2d 731, 643 N.W.2d 869, *review denied*, 2002 WI 109, 254 Wis. 2d 262, 648 N.W.2d 477 (Wis. May 21, 2002) (Nos. 01-1015-CR, 01-1559-CR)). Probable cause is assessed by looking at practical considerations on which reasonable people, not legal technicians, act. ***Erickson***, 260 Wis. 2d 279, ¶14. Probable cause does not mean more likely than not. ***Id.*** It is only necessary that the information support a reasonable belief that guilt is more than a possibility. ***Id.***

¶19 Finally, "[a] search may immediately precede a formal arrest so long as the fruits of the search are not necessary to support the [probable cause for] arrest." ***Mata***, 230 Wis. 2d at 574.

¶20 On appeal, we may affirm on different grounds than those relied on by the trial court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). Furthermore, when we affirm on other grounds, we need not discuss our disagreement with the trial court's chosen grounds of reliance. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

¶21 *Discussion*. As already noted in the facts, the trial court denied Sykes' motions to suppress because it thought the search of the wallet was reasonable under the law of investigatory stop and under the "plain view" doctrine. On appeal, Sykes argues that the trial court erred in denying his motions because the seizure of contraband out of his wallet was not a lawful seizure pursuant to a lawful investigatory stop and pat-down under ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). Additionally, Sykes argues that the seizure was not a lawful seizure pursuant to the "plain view" exception to the warrant requirement of the Fourth Amendment. The State switches focus on appeal and argues that Sykes consented to the search of his wallet and that the police lawfully opened the wallet and found the contraband in plain view. Sykes responds that the State waived the consent argument by not raising it before the trial court.

¶22 The parties' arguments are unpersuasive and we need not address them because we decide the case on other grounds. Additionally, because we affirm on other grounds, we do not discuss the grounds relied on by the trial court. *See* ***Liberty Trucking***, 57 Wis. 2d at 342.

¶23 Upon review of the law, the record, and the appellate briefs, and after hearing oral arguments, we conclude that the search of Sykes' wallet was a reasonable search incident to a lawful arrest. In this case, Horvath knew the

following information when he opened Sykes' wallet. He knew that he had been called to a scene to back up a fellow officer. He knew his entry into the apartment was with the consent of the renter and the landlord. He knew that the people found in the apartment by the officer on the scene and the landlord were not supposed to be in the apartment. He also knew—because of reports to the landlord that people were coming and going at all hours and staying only briefly—that there was possible drug activity taking place.

¶24 A reasonable police officer would reasonably believe under these circumstances that Sykes, being one of the unauthorized people found in the apartment, was criminally trespassing at the very least. *See* ***Londo***, 252 Wis. 2d 731, ¶10. Thus, these facts supply probable cause for an arrest. As such, it was entirely reasonable for Horvath to search Sykes' wallet. This is a type of valid search that "may immediately precede a formal arrest" because the fruits of the search were not necessary to support the probable cause for arrest. *See* ***Mata***, 230 Wis. 2d at 574. The fact that Horvath and Kluck arrested Sykes for possession rather than for criminal trespassing does not negate that probable cause for arrest existed at the time of the search. The search of Sykes' wallet was a reasonable search incident to a lawful arrest.

By the Court.—Judgment affirmed.

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