COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3292-CR **Cir. Ct. No. 02CF006017**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGG E. WENDLANDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Reserve Judge. *Affirmed.*

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

¶1 PER CURIAM. Gregg E. Wendlandt appeals from a judgment entered after he pled guilty to one count of possession of cocaine, second or subsequent offense, contrary to WIS. STAT. §§ 961.16(2)(b)1, 961.41(3g)(c) and

961.48(3) (2001-02).[1] He claims the trial court erred in denying his motion to suppress. Because the cocaine was discovered in plain view during the community caretaker function by the officer, Wendlandt's Fourth Amendment rights were not violated and the trial court did not err in denying the motion seeking to suppress the cocaine. Therefore, we affirm.

I. BACKGROUND

¶2 On October 11, 2002, Police Officer Robert Kendziorski was dispatched to the St. Joseph Regional Medical Center Emergency Room. The purpose of the call was with regard to a man, suspected to be an overdose victim, who had been left at the hospital and was unconscious. When Officer Kendziorski arrived, he asked the man his name and received no response. He then began searching the man's pants to locate some identification. Before he discovered the man's county ID, he pulled a pack of cigarettes out of the man's pocket. In the cellophane wrapper of the pack, and clearly visible, was a folded dollar bill with a bulge in it. Kendziorski believed, based on previous experience, that the bulge was contraband. Upon removing and unfolding the bill, he discovered crack cocaine. He subsequently located the county ID, which indicated that the overdose victim was Wendlandt.

¶3 On November 27, 2002, Wendlandt was charged with a second or subsequent offense of possession of cocaine. He entered a not guilty plea and moved to suppress the cocaine that was seized from his personal belongings while

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

he was at the hospital. The trial court denied the motion. Wendlandt entered a guilty plea and he was sentenced to sixty days in jail. He now appeals.

II. DISCUSSION

¶4 The issue in this case is whether the trial court erred in denying Wendlandt's motion seeking to suppress the cocaine. Wendlandt contends that by seizing the cocaine, the officer "stepped out" of the community caretaker role, thereby requiring the officer to obtain a search warrant before opening the dollar bill. He further contends that the plain view doctrine does not apply because the discovery was not "inadvertent" nor "immediately apparent." We disagree with Wendlandt's contentions.

¶5 In reviewing a motion to suppress, our standard is mixed. Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact. We accept the trial court's underlying findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, we independently determine whether a search or seizure passes constitutional muster. ***Eckert***, 203 Wis. 2d at 518.

¶6 Absent a showing of a recognized exception to the warrant requirement, a search is presumptively unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984); ***State v. Gonzales***, 147 Wis. 2d 165, 167-68, 432 N.W.2d 651 (Ct. App. 1988). The State bears the burden of proving that the search and seizure falls within one of the recognized exceptions. ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994).

¶7 Here, the State proved that two exceptions, working together, justified the search and seizure of the cocaine discovered in Wendlandt's pants. First, Wendlandt concedes that Officer Kendziorski could legally perform a limited search for identification under the community caretaker exception to the warrant requirement of the Fourth Amendment. *See* ***State v. Ellenbecker***, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990).

¶8 Wendlandt argues, however, that when Officer Kendziorski discovered the bulging dollar bill in the cigarette package, Kendziorski should not have investigated further because there was no possibility that an ID card was contained in the cigarette package or dollar bill. This argument would be true if the facts in this case were limited to the community caretaker exception. However, at the point that Kendziorski saw the bulging dollar bill, another exception applied—that is, the plain view doctrine.

¶9 Under the plain view doctrine, seizure and inspection of evidence without a warrant is justified when: (1) the item is in plain view and its incriminating character is "immediately apparent"; and (2) the officer must be lawfully located where the object can be seen and must have a lawful right of access to the object itself. ***Horton v. California***, 496 U.S. 128, 136-37 (1990). Although Wendlandt argues that the evidence must also be "inadvertently" discovered, this element is no longer required by plain view law. *See* ***id.*** at 137; ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992).

¶10 In applying the elements of the plain view doctrine, we begin with whether the item was in plain view and whether its incriminating character was immediately apparent. If an officer has probable cause to believe that the object is

contraband or evidence of a crime, then its incriminating character is immediately apparent. ***United States v. Paige***, 136 F.3d 1012, 1023 (5th Cir. 1998).

¶11 Here, the bulge in the dollar bill was in plain view. The next question then is whether Kendziorski had probable cause to believe that the bulge was contraband or evidence of a crime. Probable cause requires that the facts available to the officer would lead a reasonable person to believe that the item may be contraband. ***State v. McGill***, 2000 WI 38, ¶41, 234 Wis. 2d 560, 609 N.W.2d 795. In assessing whether probable cause exists, the court may consider the officer's previous experience and the inferences that the officer draws from his experience and the surrounding circumstances. ***Id.***, ¶42.

¶12 Here, Kendziorski testified that the bulge attracted his attention because he had seen crack cocaine folded up in dollar bills and, based upon his past experience with drug crimes, this dollar bill was folded the same way that drug dealers fold dollar bills to conceal cocaine. Moreover, the bulge led to the reasonable inference that it contained contraband because Wendlandt was brought to the hospital as a suspected overdose. Based on the totality of these circumstances, we conclude that the officer had probable cause to believe that the bulge constituted contraband or evidence of a crime.[2]

¶13 The next step is whether the officer had the lawful right to be where the object was seen and whether the officer had the lawful right to access the object. Both of these elements are satisfied. It is undisputed that the officer was

[2] There is some dispute as to whether the bulge was visible before or after the dollar bill was removed from the cellophane of the cigarette pack. According to the record before us, the trial court found that the officer saw the bulge before he removed the dollar bill. That factual finding is not clearly erroneous based on testimony from the officer.

called to the hospital for the purposes of identifying the overdose victim. Thus, he was lawfully in the hospital at the bedside of Wendlandt. *See* ***State v. Dube***, 655 A.2d 338, 339-40 (Me. 1995) (community caretaker function can justify officer lawfully being in position to see item in plain view).

¶14 Second, he also had lawful access to the pants' pocket containing the cigarette pack. The officer was looking through the pants as part of the community caretaker function in an attempt to identify the overdose victim. Because Kendziorski was looking for the overdose victim's identification in the exercise of the police community caretaker function when he saw the folded dollar bill in plain view, he lawfully had the right of access to the items discovered in Wendlandt's pants' pocket.

¶15 Based on the foregoing, we conclude that the requirements of the plain view doctrine were satisfied and, therefore, the seizure and inspection of the folded dollar bill with the bulge was justified. Accordingly, Wendlandt's Fourth Amendment rights were not violated and the trial court did not err in denying the motion to suppress.

By the Court.—Judgment affirmed.

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