COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1062-CR **Cir. Ct. No. 2004CF235**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THONG L. SOUN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Thong Soun appeals a judgment of conviction for possession of cocaine as a second offense and an order denying his motion to suppress evidence. Soun argues that the cocaine in his pocket was found during an illegal search and should have been suppressed. He further asserts that his

post-arrest, post-***Miranda***[1] statements should have been suppressed as fruit of the poisonous tree. We affirm, but for different reasons than the circuit court. We conclude that the officer had reasonable suspicion to search and probable cause to arrest Soun, rendering the search valid and the statements and cocaine properly admitted.

Background

¶2 The underlying facts are undisputed. On March 3, 2004, Green Bay police officer Joseph Hoyer was dispatched to an apartment complex in response to a complaint about possible runaways in a certain apartment. When Hoyer arrived, he listened outside the apartment door for approximately five minutes and was able to discern three or four male and female voices inside.

¶3 When he knocked on the door, a male voice—later identified as Michael Jensen, the tenant—stated that he did not need the police. Hoyer insisted on speaking with him, and Jensen replied that he had just gotten out of the shower and needed to get dressed. Hoyer responded that was fine, but that Jensen should not take too long.

¶4 As Hoyer waited, he heard movement inside the apartment as well as hushed voices and doors closing. Also, off-duty officer D. Schmeichel, who was the complainant and a resident of the complex, arrived. He indicated the landlord also had concerns about potential runaways in the apartment.

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

¶5 When Jensen opened the door, he initially refused to allow the officers in, but relented and granted entry when Hoyer asked if Jensen wanted the neighbors to hear their conversation in the hallway. Once inside, Hoyer asked Jensen to have his friends come in the living room area. Jensen refused, and the officers had him sit on the couch under Schmeichel's supervision while Hoyer did a protective sweep of the apartment. Hoyer testified he undertook the sweep because of safety concerns based on the likelihood people were hiding from him.

¶6 During the sweep, Hoyer found Soun alone in what Jensen described as the computer room. In plain sight on the computer desk was a plate with a "green leafy vegetable material" that appeared to be marijuana. Hoyer also located two teenaged women in the apartment. Hoyer had all three return to the main area, seating them at the dinette table. Soun indicated he was at Jensen's simply to borrow Jensen's vehicle. Jensen denied any knowledge of the marijuana in the computer room. A check of all four individuals revealed no outstanding warrants, although the girls admitted to being truant and one appeared to have recently used drugs. It also appeared that Jensen was under the influence of narcotics.

¶7 Turning to Soun, Hoyer indicated he would like to "get rid of" him. Soun said he would be happy to go. Hoyer then said "you wouldn't mind if I searched you" and Soun consented. Hoyer found a rock of cocaine and a large wad of money in Soun's pocket and arrested him. Soun, who was given his ***Miranda*** warnings and first said he did not want to talk to police, then added he did not know the cocaine was in his pocket. He then waived his ***Miranda*** rights and eventually stated he had "a couple of hits" earlier in the day. Soun was charged with possession of cocaine as a second offense.

¶8 In the circuit court, Soun moved to suppress the cocaine on the grounds that he had not freely and voluntarily consented to the search because he was illegally detained. He further argued his statement was fruit of the poisonous tree. The court found the police had probable cause to enter the apartment, that Soun was about to be permitted to leave, and that Soun had consented to the search. Soun appeals.

Discussion

¶9 "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, which we review under two different standards. We uphold a circuit court's findings of fact unless they are clearly erroneous …. We then independently apply the law to those facts de novo." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621 (citation omitted). Because the underlying facts are undisputed, however, only a question of law remains and we are therefore not bound by the circuit court's legal conclusions. ***State v. Olson***, 2001 WI App 284, ¶6, 249 Wis. 2d 391, 639 N.W.2d 207. We may affirm the decision on grounds other than those relied upon by the circuit court. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 549, 500 N.W.2d 289 (1993); ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

The Protective Sweep

¶10 Soun complains Hoyer entered the apartment without probable cause, performed an invalid protective sweep of the apartment, and illegally detained Soun. The State contends that Soun cannot challenge the sweep because he failed to show any reasonable expectation of privacy in the apartment. *See* ***State v. Trecroci***, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 630 N.W.2d 555. In

his reply brief, Soun concedes he cannot prove he had any reasonable expectation of privacy in Jensen's apartment, and he asserts he is not seeking to suppress any evidence obtained during the sweep. Accordingly, we need not address the sweep's validity.

Reasonable Suspicion to Detain

¶11 Because Soun has conceded he cannot challenge the sweep, we turn to his argument that he was illegally detained. Reasonable suspicion justifying a seizure for investigatory purposes must be based on "specific reasonable inferences which an officer is entitled to draw from the facts in light of his or her experience." ***Olson***, 249 Wis. 2d 391, ¶7; *see also* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). Reasonable suspicion may not be based on an inchoate or unparticularized suspicion. ***Olson***, 249 Wis. 2d 391, ¶7. In other words, there must be "specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that a crime has been, or is about to be, committed." ***Id.***

¶12 Here, as Hoyer was conducting the protective sweep, he knew the following. First, upon arriving at the apartment, he had heard multiple voices inside the apartment. Second, when he asked Jensen to open the door, he heard movement, hushed voices, and doors closing. Third, when Jensen finally allowed Hoyer into the apartment, the sources of the other voices were unseen and ostensibly evading the officer. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000) (citation omitted). Fourth, Hoyer then found Soun alone in the computer room. Fifth, there appeared to be marijuana in plain view in the computer room that Soun occupied.

¶13 Because only Soun was in the room, and the marijuana was in the open, it would have appeared that Soun had the marijuana within his "dominion and control." *See* ***Maryland v. Pringle***, 540 U.S. 366, 372 (2003). Accordingly, Hoyer could suspect that Soun had recently used, or was about to use, the marijuana and detention was in order. Hoyer's seizure of Soun was valid.

Probable Cause to Arrest

¶14 The validity of the sweep and detention, standing alone, does not fully inform on the search that produced the cocaine. But the initial seizure was valid and, following a brief investigatory period, Hoyer had amassed sufficient probable cause to arrest Soun for possession of marijuana.

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence … be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility …. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.
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> ….
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> Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.

State v. Koch, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993) (citations omitted).

¶15 By the time Hoyer ultimately searched Soun, he added the following facts to the five objective facts establishing reasonable suspicion. Hoyer perceived Jensen and one of the girls as under the influence of some narcotic. When

questioned, Jensen denied knowing anything about the marijuana in the computer room.

¶16 When Jensen disavowed knowledge of the marijuana—although he very well may have been lying—Hoyer had more cause to suspect Soun of its possession, not less. *See* ***State v. Mata***, 230 Wis. 2d 567, 572, 602 N.W.2d 158 (Ct. App. 1999). In ***Mata***, officers stopped a vehicle and noticed the smell of marijuana. When the first two passengers were searched, neither possessed drugs or paraphernalia. The court determined this made it more likely that Mata, the third passenger, possessed those items corresponding to the odor and that such a fact helped give rise to probable cause for searching Mata. ***Id.*** at 572-73. Similarly, Hoyer had probable cause to arrest Soun for possession of the marijuana in the computer room.

Search Incident to Arrest

¶17 A "search may be incident to a *subsequent* arrest if the officers have probable cause to arrest before the search." ***State v. Sykes***, 2005 WI 48, ¶15, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted) (emphasis added). "[W]hen a suspect is arrested subsequent to a search, the legality of the search is established by the officer's possession, before the search, of facts sufficient to establish probable cause to arrest followed by a contemporaneous arrest." ***Id.***, ¶16. We have concluded that Hoyer had probable cause to arrest Soun for possession of marijuana when he conducted the search; therefore, the search was valid. Because the search was valid, the cocaine was admissible, and we need not address Soun's

argument that his subsequent statements are inadmissible as fruit of the poisonous tree.[2]

By the Court.—Judgment and order affirmed.

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

[2] While Soun points out that Hoyer intended to release Soun, probable cause is an objective test; an officer's subjective beliefs are irrelevant to the analysis. *See* ***State v. Sykes***, 2005 WI 48, ¶29, 279 Wis. 2d 742, 695 N.W.2d 277; ***State v. Mata***, 230 Wis. 2d 567, 574, 602 N.W.2d 158 (Ct. App. 1999). Equally irrelevant are the facts that Soun argues were not proven. Unproven facts do not negate those that were proven.