

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1046-CR

Cir. Ct. No. 2007CF199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM A. SLOAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. William A. Sloan appeals from a judgment of conviction for possessing cocaine with intent to deliver as a subsequent drug offense. The issue is whether the deputy sheriff's warrantless search of Sloan's

bathroom was constitutionally reasonable. We conclude that it was because the search was incident to Sloan's arrest. Therefore, we affirm.

¶2 We summarize the significant facts from the testimony at the suppression hearing. Two witnesses testified: Sloan's parole agent, and the deputy sheriff who assisted in transporting Sloan incident to his arrest.

¶3 Tracy Tims was Sloan's parole agent. On February 21, 2007, Tims and another agent made an unscheduled visit to Sloan's home. As Tims entered Sloan's apartment, she could see beer bottles in the garbage and six-pack cardboard beer-bottle-holders on the living room floor, prompting his arrest on a probation hold because, as Tims testified, Sloan "had had a couple of ... violations with alcohol in the house before." Sloan was confined to a wheelchair; consequently, Tims called the sheriff's department to transport Sloan to jail pursuant to departmental protocol.

¶4 Deputy Sheriff William Peck arrived at Sloan's apartment to transport Sloan at Tims's request. When Peck arrived, one of the agents showed him what they suspected was cocaine found on the premises. Peck was told that Sloan was in the bathroom because Tims had directed Sloan to provide her with a urine sample. Tims told Peck that Sloan was in the bathroom for at least ten minutes, much longer than what she thought was necessary. Tims also heard "weird noises" coming from the bathroom. Tims finally opened the door, and asked Sloan what he was doing, indicating to Peck that Sloan seemed to be "shoving something down the [sink] drain." As Sloan exited the bathroom, Peck entered "to secure the area immediately ... to prevent the destruction of ... possible evidence." Peck testified that "when I initially went in there, the drain stopper was removed, and I could see white chunks of some type of substance

down in the drain where ... the trap would be.” Peck further testified that “[i]t appeared that someone had attempted to dispose of possible cocaine down the sink.”

¶5 Sloan was charged with possessing more than forty grams of cocaine with intent to deliver as a subsequent drug offense, in violation of WIS. STAT. §§ 961.41(1m)(cm)4. (2007-08) and 961.48(1)(a) (2007-08).¹ He moved to suppress the cocaine seized as the fruits of an illegal search. After an evidentiary hearing, the trial court denied the motion. Ultimately, Sloan pled guilty to the offense as charged. The trial court imposed a fourteen and one-half-year sentence, comprised of four and one-half- and ten-year respective periods of initial confinement and extended supervision. Sloan appeals to challenge the denial of his suppression motion. *See* WIS. STAT. § 971.31(10). He expressly challenges Peck’s search; he does not challenge the search conducted by Tims.

¶6 A search incident to an arrest may be constitutionally reasonable to prevent the destruction of evidence. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969); *see also Virginia v. Moore*, 128 S. Ct. 1598, 1607-08 (2008). We uphold the trial court’s factual findings unless they are clearly erroneous, while we independently review the trial court’s conclusion on whether the search was constitutionally reasonable. *See State v. Murdock*, 155 Wis. 2d 217, 225-26, 455 N.W.2d 618 (1990).

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

¶7 The trial court denied the motion, finding that Peck was at the scene

to put the defendant under arrest for his probation hold. When the agent initially found the alcohol, the search after that would be search incident to that probation arrest, and also on top of that, the deputy testified that both he and the agent believed the defendant to be in the bathroom destroying evidence of the cocaine, which they had already observed prior to the deputy even getting there, on the defendant's person in the garbage, in the kitchen, and then when the agent and the deputy saw it in the bowl of the sink in the bathroom and [Sloan] was shuffling around suspiciously, according to the agent. On top of that, exigent circumstances were present to prevent that. Also because there are two other people according to the deputy in the residence who could have destroyed the evidence had he left and gone and got a search warrant.

So [the trial court] believe[s] that the search in this case was appropriate.

....

[T]he box that was in the bathroom with the holes in it, the plastic bags with the white powder in it was in plain view technically. The deputy could see it just by peering into the holes of the box which led to the discovery of that cocaine. The scales and the grinder were in plain view in the bathroom.

¶8 We independently conclude that Peck's search of Sloan's bathroom was constitutionally lawful as incident to Sloan's arrest. *See Chimel*, 395 U.S. at 762-63. The following facts are not clearly erroneous; they are consistent with the testimony of Tims and Peck, the only two witnesses who testified at the suppression hearing.

¶9 Peck was dispatched to Sloan's apartment to transport him because he was under arrest pursuant to a probation hold for violating the conditions of his parole. When Peck arrived, the parole agent showed him cocaine that was discovered at the scene. Peck was present while Sloan was in the bathroom, and testified that he was told or overheard the parole agent say that "it appeared that

[Sloan] was dumping or getting rid of drugs down the [bathroom] drain.” Peck testified that he searched the bathroom to prevent the destruction of evidence, namely the cocaine from dissipating down the drain.

¶10 Whether Sloan had technically been arrested at that particular juncture is inconsequential because the probable cause to arrest had been established by the time Peck searched the bathroom in an attempt to prevent the destruction of evidence, namely Sloan’s attempt to dispose of the cocaine by pouring it down the drain of the bathroom sink. *See State v. Sykes*, 2005 WI 48, ¶15, 279 Wis. 2d 742, 695 N.W.2d 277. We therefore conclude that Peck’s search to prevent the destruction of evidence incident to Sloan’s arrest was constitutionally reasonable. Consequently, it is unnecessary to decide whether the evidence seized was alternatively admissible pursuant to the doctrine of inevitable discovery. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938).

By the Court.—Judgment affirmed.

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

