COURT OF APPEALS DECISION DATED AND FILED

October 4, 2011

A. John Voelker
Acting 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. 2010AP2610-CR — **Cir. Ct. No. 2009CF144**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DINO A. MCCOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Dino McCoy appeals a judgment convicting him of possession with intent to distribute or deliver cocaine, in violation of WIS. STAT. § 961.41(1m)(cm)1r. (2009-10). McCoy argues that the police lacked probable cause to arrest him, and discovered the cocaine during an invalid search of his

person incident to arrest. Because the police had probable cause to arrest McCoy based on his constructive possession of a nearby pipe packed with marijuana, we affirm.

BACKGROUND

¶2 On February 20, 2009, police executed a search warrant for an Eau Claire residence belonging to Kelsey Loew. Officers knocked and announced their presence several times and heard a male voice inside, but no one came to the door. After ten to twenty seconds, officers entered the residence and detained McCoy at the foot of a couch in the living room. No more than three feet away from McCoy, and next to the couch, was an end table on which a packed marijuana pipe was in plain view. After securing the premises, police searched McCoy and found a blue cloth bag containing nine small packets of crack cocaine. McCoy was subsequently arrested.

¶3 McCoy was charged with a number of drug crimes. He filed a motion to suppress the cocaine, arguing that the evidence was obtained in violation of his Fourth Amendment rights. The circuit court denied his motion, and McCoy pled no contest to the charge for which he was convicted. The remaining charges were dismissed.

DISCUSSION

¶4 In reviewing an order granting or denying a suppression motion, this court will uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Secrist***, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). We then review de novo the application of constitutional principles to those facts. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829.

¶5 This case turns on whether the police had probable cause to arrest McCoy. Generally, police may conduct a search incident to arrest to protect the officer and to seize evidence in order to prevent its concealment or destruction. ***State v. Denk***, 2008 WI 130, ¶41, 315 Wis. 2d 5, 758 N.W.2d 775. But arrest is not a condition precedent to a valid incidental search of the suspect. 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. In other words, the intrusion is justified by an arrest immediately following the search, coupled with probable cause to arrest before the search. ***Id.***, ¶26.

¶6 "Probable cause is the *sine qua non* of a lawful arrest." ***Secrist***, 224 Wis. 2d at 212. In the search incident to arrest context, probable cause to arrest is the quantum of evidence within the searching officer's knowledge at the time of the search, "which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***Id.*** This is more than a mere possibility or suspicion that the defendant committed an offense, but the evidence need not establish that guilt is more likely than not. ***Id.*** "Whether probable cause exists in a particular case must be judged by the facts of that case." ***Id.***

¶7 Here, the State argues that the police had probable cause to believe that McCoy constructively possessed the marijuana pipe found in Loew's residence. Physical possession of contraband is not necessary to give rise to probable cause. *See* ***Ritacca v. Kenosha Cnty. Court***, 91 Wis. 2d 72, 82, 280 N.W.2d 751 (1979). "It is enough if the defendant has constructive possession of the controlled substance or is within such juxtaposition to the substance such that he might be said to possess it." ***Id.*** (internal quotation marks omitted). "Possession is 'imputed when the contraband is found in a place immediately

accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug.'" ***Id.*** at 82-83 (quoting ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977)).

¶8 We agree with the State. At the suppression hearing, police sergeant Russell Cragin testified that another officer knocked on the door and repeatedly announced, "Police, search warrant." A male voice answered from the inside, but the person did not immediately open the door. After waiting ten to twenty seconds, officers breached the door. Cragin was among the initial officers to enter the residence, but one of the last in line.

¶9 Cragin testified that once inside, police are trained to "secure the premises to make sure that there's nobody else there." The front door opened into a living room. The officers ahead of Cragin immediately detained McCoy, the room's sole adult occupant.[1] McCoy was at the foot of a couch. Within two or three feet of McCoy and next to the couch was a small end table, on top of which sat a pipe packed with marijuana.

¶10 These facts were sufficient for the officers to conclude that McCoy constructively possessed the marijuana pipe. The pipe was located within McCoy's reaching distance. The circumstances permit the inference that McCoy knew of the pipe and its contents, as it was lying in plain view on the end table just two or three feet away. *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 813, 436 N.W.2d 898 (Ct. App. 1989) (inference of knowing possession buttressed by drugs found

[1] Two young children, a one-year old and a three-year old, were also present with McCoy in the living room.

in plain view). Although other individuals were ultimately found in the residence, McCoy was the only person to whom the pipe was readily accessible.[2] Thus, police had probable cause to believe that McCoy had committed a crime, and the subsequent search was justified as incidental to an arrest.

¶11 McCoy argues that Cragin's testimony is insufficient to establish probable cause because he did not state where McCoy was in relation to the marijuana pipe when police entered the house. It is true that, as one of the last officers to enter the residence, Cragin did not testify regarding McCoy's position when the door was breached. Yet the rational inference from Cragin's testimony is that the officers entered more or less simultaneously, with at most a few seconds separating them.[3] Immediately before the officers breached the doorway, they heard a male voice on the other side of the door. Cragin's testimony was sufficient to support the conclusion that McCoy had moved little, if at all, from the location where Cragin observed him upon entering the residence.

¶12 Citing ***State v. R.B.***, 108 Wis. 2d 494, 322 N.W.2d 502 (Ct. App. 1982), McCoy also argues that his mere presence, even when coupled with his access to and knowledge of the marijuana, is insufficient to constitute possession. In ***R.B.***, a minor admitted to attending a beer party but denied drinking or intending to drink beer. ***Id.*** at 496. The trial court found that R.B. was at the party to talk and visit with others, but not to drink. ***Id.*** We reversed R.B.'s conviction

[2] One person was found in the basement. Officer Cragin could not recall where in the residence the second person was found, but testified that McCoy was the only adult in the living room.

[3] According to Cragin, securing the premises, presumably including the basement, took no more than three minutes from the time of entry.

for possession of alcohol because we concluded that, in light of the trial court's finding, there could be no determination of actual control or intent to exercise control over the contraband. ***Id.*** at 497-98. As we have explained, police were justified in believing that McCoy possessed the marijuana pipe based on the surrounding facts and reasonable inferences from those facts.

¶13 McCoy also cites a litany of federal cases for the proposition that a nexus must exist between the accused and the contraband. *See* ***United States v. Brown***, 3 F.3d 673 (3d Cir. 1993); ***United States v. Onick***, 889 F.2d 1425 (5th Cir. 1989); ***United States v. Rackley***, 742 F.2d 1266 (11th Cir. 1984). "[M]ere proximity to the drug, or mere presence on the property where it is located or mere association with the person who does control the drug or the property, is insufficient to support a finding of possession." ***Brown***, 3 F.3d at 680. But here, the circumstances established the requisite nexus between McCoy and the marijuana pipe. The pipe, packed with marijuana, was in plain view on a small table next to the couch where McCoy was detained; it was not hidden or obscured, and was either ready for use or had been used.[4] McCoy was the only adult in the room. The evidence of dominion or control is more compelling in this case than it was in ***Brown***, ***Onick***, or ***Rackley***.[5] Indeed, the ***Onick*** court suggested that it might have ruled differently had the defendant been found in a room containing drugs or drug paraphernalia. *See* ***Onick***, 889 F.2d at 1429.

[4] Cragin could not recall whether the marijuana in the pipe was fresh or burned.

[5] We note the issue in these cases was not probable cause to arrest but, rather, the sufficiency of the evidence to support the defendants' convictions.

¶14 The crime for which a defendant is arrested following a search need not be the same crime giving rise to probable cause to arrest. As our supreme court explained in ***Sykes***, 279 Wis. 2d 742, ¶27, "as long as there was probable cause to arrest before the search, no additional protection from government intrusion is afforded by requiring that persons be arrested for and charged with the same crime as that for which probable cause initially existed." Officers had probable cause to arrest McCoy for possession of marijuana when they searched him. His arrest and subsequent conviction for possession of cocaine are therefore constitutionally valid.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).