COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1428-CR **Cir. Ct. No. 2013CM665**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. KAULFUERST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Steven Kaulfuerst appeals his judgment of conviction for possession of tetrahydrocannabinols (THC) following the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court's denial of his motion to suppress evidence obtained from a protective frisk. We affirm.

Background

¶2 The relevant evidence for this appeal comes from two village of Grafton police officers who testified at the suppression hearing related to Kaulfuerst's motion. Their relevant, undisputed testimony is as follows.

¶3 Officer Justin Lawrenz testified that at approximately 11:00 p.m. at night he responded to a complaint of a disturbance in the village of Grafton. Upon arriving at the location of the complaint, he observed Kaulfuerst in an intoxicated and highly agitated state. In speaking with the resident of the area who made the complaint, Lawrenz learned that Kaulfuerst had made a loud noise by striking a street sign, went up the resident's driveway in a highly agitated state, and exhibited clenched fists to the resident.

¶4 Officer Jerrod Ray testified that he also responded to the scene, a neighborhood of all single-family homes, and observed Kaulfuerst in an agitated state. He saw swelling to the knuckles of Kaulfuerst's right fist, and upon Ray's inquiry, Kaulfuerst indicated that the injury occurred when Kaulfuerst struck a street sign in the area. Kaulfuerst also informed Ray that he had been wrestling with his brother at his nearby residence and had become agitated after losing a match.

¶5 The officers decided to drive Kaulfuerst to the residence to check on the welfare of the brother. Prior to placing Kaulfuerst in the squad car, Ray performed a pat-down search on him, during which he located a prescription bottle containing marijuana.

¶6 The State charged Kaulfuerst with possession of THC, and Kaulfuerst moved to suppress the evidence. An evidentiary hearing was held, following which the circuit court denied the motion. Kaulfuerst subsequently pled to the charge, was sentenced, and now appeals.

Discussion

¶7 Kaulfuerst contends the circuit court erred in denying his motion to suppress. When reviewing such a denial, we uphold the circuit court's findings of fact unless they are clearly erroneous, but we review independently whether the court properly applied constitutional principles to those facts. ***State v. Sykes***, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277.

¶8 Our supreme court's reasoning in ***Sykes*** is determinative of this appeal. In that case, law enforcement officers found Sykes in the apartment of another individual without that individual's permission. ***Id.***, ¶¶4, 8, 19. An officer asked Sykes for identification and Sykes stated it was not on him but in his wallet. ***Id.***, ¶¶8-9. Upon the officer's inquiry, Sykes indicated where his wallet was located. ***Id.***, ¶9. The officer retrieved the wallet, opened it, and discovered a baggie of cocaine, leading to Sykes' arrest, the discovery of more cocaine, and a charge for possession of cocaine with intent to deliver. ***Id.***, ¶¶3, 9.

¶9 Sykes brought a motion to suppress the evidence, arguing that the search of his wallet was unlawful because the officer who found the cocaine in it did not have probable cause to arrest him for a cocaine-related offense prior to the search. ***Id.***, ¶¶1, 3. The circuit court denied the motion, and Sykes pled to amended charges. ***Id.***, ¶10. He then appealed the denial of his motion. ***Id.***, ¶¶10-11.

¶10 On appeal, the supreme court held that the search of Sykes' wallet was lawful because at the time the officer conducted the search, he had probable cause to arrest Sykes for *trespassing* and search the wallet incident to such an arrest, even though the officer in fact had not arrested Sykes for trespass and only arrested Sykes after the cocaine was found in the wallet. ***Id.***, ¶¶17, 19, 22, 26, 34. The court specifically rejected Sykes' argument that the search would have been valid only if, before performing the search, the law enforcement officer had subjectively intended to arrest Sykes for trespass and if in fact he had arrested him for trespass after the search. ***Id.***, ¶¶2, 23-25. The court held that a search is lawful if an objective view of the facts known to law enforcement officers prior to the search demonstrates that the officers have probable cause to arrest the person for some offense and if the officers actually do arrest the individual after the search, even if for a different offense. ***Id.***, ¶¶2, 27-31, 34.

¶11 The case now before us is very similar. Here, officers were aware of the following facts prior to the challenged search: around 11 p.m. in a residential neighborhood, Kaulfuerst had intentionally struck a street sign hard enough to injure his knuckle and loud enough to disturb at least one local resident, and when the resident addressed the matter with Kaulfuerst, Kaulfuerst confronted him on his property in a highly agitated state and with fists clenched.

¶12 The disorderly conduct statute provides:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

WIS. STAT. § 947.01(1). The objective facts possessed by the officers constituted probable cause to believe Kaulfuerst had engaged in conduct which was

unreasonably loud or otherwise disorderly and did so under circumstances which tended to cause or provoke a disturbance. *See* ***Sykes***, 279 Wis. 2d 742, ¶31. While we do not know whether a jury ultimately would have convicted Kaulfuerst of disorderly conduct if that offense would have been charged and tried, the officers had probable cause to arrest him for the offense prior to the search of his person. During this search, marijuana was located and the officers immediately arrested Kaulfuerst for possession of the same. Based upon the above, the search was lawful.[2]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[2] Kaulfuerst asserts in his reply brief that the State failed to raise before the circuit court, and thus waived, its argument that the search was justified because the officers had probable cause to arrest Kaulfuerst for disorderly conduct, even if they did not in fact arrest him for that offense. Kaulfuerst is mistaken. Although the State never actually used the words "probable cause," this argument for denial of Kaulfuerst's motion to suppress was in fact the first of two arguments made by the State to the circuit court at the suppression hearing.