COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP753-CR **Cir. Ct. No. 2013CF170**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIN ALVAREZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: EDWARD L. STENGEL, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Martin Alvarez, Jr., appeals a judgment of conviction for possession of tetrahydrocannabinols (THC) with intent to deliver and misdemeanor bail jumping, both as a repeater. He challenges the circuit

court's denial of his suppression motion and also the admissibility of a police officer's expert testimony under ***Daubert***.[1] We affirm.

¶2 The following facts are taken from the circuit court's hearing on Alvarez's suppression motion. In March 2013, Alvarez's probation agent, Christine Olig, received information that Alvarez was dealing heroin. The information came from another supervised offender who resided at the same transitional living placement (TLP) as Alvarez. At that time, Alvarez was on probation for possession of marijuana with intent to deliver and had previously tested positive for opiates. He was residing at the TLP on an alternative to revocation.

¶3 Based on the information received about Alvarez, Olig's supervisor directed Olig to search Alvarez's living quarters. Olig called the Sheboygan Police Department and asked for officers to be present during the search for safety. She told the dispatcher that the officers could arrive before her. She also informed the dispatcher that her department had issued apprehension requests for Alvarez and another resident and that the officers could apprehend them prior to her arrival.

¶4 Officer Piotr Gordziej and one other officer proceeded to the TLP and took Alvarez and another resident into custody. Gordziej did a protective sweep of the living quarters and found it empty. Olig arrived shortly thereafter along with two other agents. She informed the officers that the search was the agents' search but asked for guidance in identifying what she was looking for in

[1] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

packaged heroin. Gordziej told her it could be anywhere, as heroin came in very small, tinfoil packets.

¶5 Gordziej remained present in the living quarters during the agents' search but just stood there. Olig began the search in a closet where she found a backpack containing pills and a plastic baggie of marijuana. After talking to her supervisor, Olig offered the police the opportunity to take charge of the search, which they did. The officers then obtained a search warrant and discovered additional evidence.

¶6 The State eventually charged Alvarez with possession of THC with intent to deliver and misdemeanor bail jumping, both as a repeater. Alvarez filed a motion to suppress the evidence found in the search. He also filed a motion to prevent Gordziej from testifying as an expert witness. The circuit court denied Alvarez's motions, and the matter proceeded to trial.

¶7 Ultimately, the jury returned guilty verdicts on both counts against Alvarez. The circuit court sentenced him to two years of initial confinement and two years of extended supervision on the possession of THC with intent to deliver conviction. It withheld the sentence on the misdemeanor bail jumping in favor of two years of consecutive probation. This appeal follows.

¶8 On appeal, Alvarez first contends that the circuit court erred when it denied his motion to suppress. He argues that Olig lacked reasonable grounds to conduct the search and characterizes the information she received as an "anonymous tip." He also argues that the search was initiated by police and therefore required a warrant.

¶9 Probation agents do not need a warrant or probable cause to search the residence of a person under supervision. *See* ***State v. Hajicek***, 2001 WI 3, ¶36, 240 Wis. 2d 349, 620 N.W.2d 781. Agents may search the residence if they have reasonable grounds to believe that the person has contraband. ***State v. Jones***, 2008 WI App 154, ¶9, 314 Wis. 2d 408, 762 N.W.2d 106; *see also* WIS. ADMIN. CODE § DOC 328.21(3)(a) (Dec. 2006).[2]

¶10 Probation agents may conduct warrantless searches of the persons they are supervising because the agents must ensure "that the probationer observes the restrictions placed upon the probationer's liberty during the probation." ***Hajicek***, 240 Wis. 2d 349, ¶36. "These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." ***Id.*** (quoting ***Griffin v. Wisconsin***, 483 U.S. 868, 875 (1987)).

¶11 Whether a search is a probation search or a police search presents a question of constitutional fact requiring application of the same two-step process as we ordinarily use in reviewing the denial of a suppression motion. *See* ***Hajicek***, 240 Wis. 2d 349, ¶¶14-15. We first review the circuit court's findings of historical facts under the clearly erroneous standard. ***Id.***, ¶15. We then review the court's determination of constitutional fact de novo. ***Id.***

¶12 Based on the testimony at the suppression hearing and the circuit court's findings of facts, we conclude that Olig had reasonable grounds to conduct the search of Alvarez's living quarters. As noted, at the time of the search,

[2] The current regulation permitting agent searches of supervisee's residences, WIS. ADMIN. CODE § DOC 328.22 (July 2013), went into effect after the search in this case.

Alvarez was on probation for possession of marijuana with intent to deliver. He had previously tested positive for opiates and was residing at the TLP on an alternative to revocation. Although the information about his alleged heroin dealing was limited in nature, it cannot be characterized as an "anonymous tip." Olig's supervisor knew the identity of the informant (another supervised offender at TLP) and presumably had the power to provide adverse consequences for giving false information. Thus, the information possessed an indicator of reliability that, coupled with the other factors, would lead an agent to reasonably believe that Alvarez had contraband.

¶13 We also conclude that the search of Alvarez's living quarters was a probation search and not a police search. Again, it was Olig who initiated the police action in the case by asking for officers to be present during the search for safety and informing them they could apprehend Alvarez and another resident prior to her arrival. Likewise, it was Olig who began the formal search, discovering a backpack containing pills and a plastic baggie of marijuana in Alvarez's closet. The fact that Officer Gordziej remained present during the search and told Olig what packaged heroin looks like did not render the search a police search. *See* ***Jones***, 314 Wis. 2d 408, ¶¶12, 15 (the presence or cooperation of a law enforcement officer does not transform a probation search into a police search). Accordingly, we are satisfied that the circuit court properly denied Alvarez's motion to suppress.

¶14 Alvarez next contends that the circuit court erred when it denied his challenge to Officer Gordziej's testimony. He argues that Gordziej's testimony did not qualify as expert testimony and should have been excluded.

¶15 The admissibility of expert testimony is governed by WIS. STAT. § 907.02 (2011-12).[3] In 2011, the legislature amended § 907.02 to make Wisconsin law consistent with the ***Daubert*** reliability standard embodied in Federal Rule of Evidence 702.[4] *See* 2011 Wis. Act 2; ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579. The amended rule provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Sec. 907.02(1).

¶16 As we explained in ***State v. Giese***, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687, the circuit court's gate-keeping function under the ***Daubert*** standard is to ensure that the expert's testimony is based on a reliable foundation and is relevant to the material issues. "The standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Id.***, ¶19.

¶17 Though the original ***Daubert*** case involved scientific experts, the Supreme Court has applied the ***Daubert*** standard with equal force to nonscientific

[3] All references to the Wisconsin Statutes are to the 2011-12 version.

[4] Federal Rule of Evidence 702 is a reflection of three cases known as the ***Daubert*** trilogy: ***Daubert***, 509 U.S. 579, ***General Elec. Co. v. Joiner***, 522 U.S. 136 (1997), and ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137 (1999). *See* Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, WIS. LAW. 14 (Mar. 2011).

expert witnesses. *See* ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 147 (1999). This is consistent with the text of Federal Rule of Evidence 702 and WIS. STAT. § 907.02, which expressly contemplates that an expert may be qualified on the basis of training and experience alone.

¶18 Ultimately, the determination of whether a witness is qualified to testify as an expert under WIS. STAT. § 907.02 is left to the sound discretion of the circuit court. ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶89, 245 Wis. 2d 772, 629 N.W.2d 727. We will sustain a circuit court's discretionary determination so long as it "examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Id.***

¶19 Here, the circuit court allowed Gordziej to provide expert testimony regarding how marijuana dealers package marijuana for sale, how marijuana is sold on the street, and what indicia he observed that indicated Alvarez intended to distribute marijuana. It did so based on Gordziej's training and experience as a police officer. Since joining the Sheboygan Police Department in 1999, Gordziej had received extensive training in drugs and drug trafficking. He had also gained considerable experience from his time in the street crimes unit and his time in the MEG unit, a unit specializing in drug investigations. Although Gordziej no longer worked in those units, he kept current with the street drug scene through law enforcement publications.

¶20 Reviewing the circuit court's decision, we cannot conclude that it erroneously exercised its discretion in permitting Gordziej's testimony. The testimony was based on a reliable foundation and was relevant to the material issue of whether Alvarez intended to deliver the marijuana found in the search. Furthermore, as noted by the State, a police officer's training and experience have

been accepted in other jurisdictions under the ***Daubert*** standard in the field of drugs and drug trafficking. *See, e.g.,* ***United States v. Schwarck***, 719 F.3d 921, 923-24 (8th Cir. 2013) (permitting a police officer to give expert testimony concerning the modus operandi of drug dealers to rebut the defendant's claim that he was merely a user and not a trafficker); ***United States v. West***, 671 F.3d 1195, 1201 n. 6 (10th Cir. 2012) (upholding a police officer's expert opinion that items found in the defendant's apartment were consistent with the distribution of marijuana); ***United States v. Garcia***, 447 F.3d 1327, 1335 (11th Cir. 2006) (recognizing that an experienced narcotics officer may provide expert testimony to help a jury understand the significance of certain conduct or methods of operation unique to the drug distribution business); ***United States v. Parra***, 402 F.3d 752, 757-58 (7th Cir. 2005) (allowing a DEA agent to testify about the use of counter-surveillance in drug transactions). For these reasons, we are satisfied that the circuit court properly denied Alvarez's challenge to Gordziej's testimony.

By the Court.—Judgment affirmed.

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