COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2138-CR
2014AP2626-CR

Cir. Ct. No. 2012CF416

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENDRA E. MANLICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed.*

¶1 REILLY, J.[1] Kendra E. Manlick pled no contest to possessing a controlled substance and two counts of misdemeanor bail jumping after her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

motion to suppress evidence from the search of her vehicle was denied. Manlick appeals that decision as well as the court's denial of her postconviction motion that her counsel was prejudicially deficient. We agree with the trial court on both issues and affirm.

Facts

¶2 On August 18, 2012, Officer Nathan Rucker of the City of Fond du Lac Police Department was on patrol when he saw Justin Norton in a vehicle. Rucker knew an active warrant was out for Norton's arrest and therefore stopped the vehicle. The driver of the stopped vehicle was Manlick. Rucker knew both Manlick and Norton from an earlier contact about two to three months prior in which both Manlick and Norton were found to be in possession of heroin and "paraphernalia associated with opiate use such as hypodermic needles." Rucker took Norton into custody on the warrant and returned to Manlick's vehicle where he looked through the passenger-side window and observed two hypodermic needles "near the center shifter compartment." Rucker knew that hypodermic needles are utilized for individuals using opiates, and he observed that the needles were not maintained in a sterile environment.

¶3 Based upon those observations and his prior knowledge of Manlick, Rucker searched Manlick's vehicle and its contents. Rucker located additional needles, bottle caps with orange residue, a roll of aluminum foil, and half of a Suboxone pill. Manlick was arrested and charged with one count of possession of drug paraphernalia, one count of possession of a controlled substance, and two counts of felony bail jumping.

¶4 Manlick moved to suppress the evidence, arguing that the search was unlawful under the United States and Wisconsin Constitutions. Following an evidentiary hearing, the court denied Manlick's motion as to the two hypodermic needles initially seen by Rucker and withheld a decision as to the rest of the evidence discovered during Rucker's search of the vehicle. The court based its decision on Rucker's lawful observation of the needles in Manlick's vehicle, which combined with his knowledge of Manlick's history, gave him "sufficient probable cause for an arrest for possession of drug paraphernalia." Manlick thereafter pled no contest to possessing a controlled substance and two counts of misdemeanor bail jumping. The charge for possession of drug paraphernalia was dismissed and read in for sentencing purposes.

¶5 Manlick brought a postconviction motion seeking to have her conviction vacated as her counsel was ineffective in failing to argue that WIS. STAT. § 961.571(1)(b)1. excludes hypodermic syringes and needles from the statutory definition of "drug paraphernalia" and, therefore, the court erred in denying her suppression motion. After an evidentiary hearing, the trial court denied the motion, concluding that Manlick was not prejudiced by her counsel's deficient performance as, even though the original decision on the suppression motion was in error, the search of the vehicle was justified based on probable cause that it contained evidence of a crime. Manlick appeals on both grounds—that the vehicle search was unlawful and that her counsel was prejudicially deficient.

Search of Manlick's Vehicle

¶6 Manlick first argues that the evidence found inside her vehicle should have been suppressed as the search of her vehicle was unlawful. We utilize

two standards when reviewing a trial court's decision on a motion to suppress evidence. ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463. We employ a deferential standard in reviewing the trial court's findings of fact, upholding them unless they are clearly erroneous, but we independently apply constitutional principles to those facts. ***Id.*** We reject Manlick's argument as Rucker's observation of the hypodermic needles through the window of her vehicle did not constitute a search for constitutional purposes and the subsequent search of her vehicle and seizure of incriminating evidence was based on probable cause that the vehicle contained evidence of criminal activity.

¶7 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Our supreme court generally interprets the state constitutional prohibition in accord with the United States Supreme Court's interpretation of the federal Constitution's prohibition. ***State v. Felix***, 2012 WI 36, ¶4, 339 Wis. 2d 670, 811 N.W.2d 775. Under this interpretation, warrantless searches are per se unreasonable except in certain well-defined circumstances. ***State v. McGovern***, 77 Wis. 2d 203, 210, 252 N.W.2d 365 (1977).

¶8 A person seeking to suppress evidence based on an unconstitutional search or seizure must have "a legitimate expectation of privacy in the invaded place." ***State v. Field***, 123 Wis. 2d 466, 469-70, 367 N.W.2d 821 (Ct. App. 1985). A person has no expectation of privacy in "that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." ***Id.*** at 472 (quoting ***Texas v. Brown***, 460 U.S. 730, 740 (1983) (plurality opinion)). "What a person knowingly exposes to the public, even in his [or her] own home or office, is not a subject of Fourth

Amendment protection." ***Katz v. United States***, 389 U.S. 347, 351 (1967). Based on these principles, we find that Rucker's observation of the two hypodermic needles in a portion of Manlick's vehicle that "would be entirely visible to him as a private citizen" was not a search within the meaning of the Fourth Amendment as she did not have a reasonable expectation of privacy in those objects. *See* ***Field***, 123 Wis. 2d at 472.

¶9 The question that follows is whether Rucker's physical intrusion into and search of Manlick's vehicle, as well as the subsequent seizure of the incriminating evidence, is justified by one of the exceptions to the warrant requirement. *See* ***Brown***, 460 U.S. at 738 n.4. We find that it is. "The information obtained as a result of observation of an object in plain sight may be the basis for probable cause … justify[ing] police conduct affording them access to a particular item." ***Id.***

¶10 Manlick argues that the fact that the needles could be seen through the vehicle's windows did not give Rucker grounds to search her vehicle as needles are expressly excluded as drug paraphernalia under WIS. STAT. § 961.571(1)(b)1. The law, however, does not require that police actually observe criminal activity in a vehicle before they may search that vehicle and its contents for evidence. *See* ***United States v. Ross***, 456 U.S. 798, 817-20 (1982). A warrantless search of a vehicle may be conducted upon probable cause to believe that the vehicle contains evidence of a crime. ***State v. Tompkins***, 144 Wis. 2d 116, 130, 423 N.W.2d 823 (1988). Probable cause deals with probabilities, not certitude, and "merely requires that the facts available to the officer would warrant a [person] of reasonable caution in the belief, that the contraband was likely to be in the place searched." ***Id.*** at 124-25 (citations omitted).

¶11 We disagree with Manlick's argument that Rucker's observation of the unsterile hypodermic needles in Manlick's vehicle and his knowledge of her prior drug history is insufficient to establish probable cause to search the vehicle. The United States Supreme Court has found probable cause to search a stopped vehicle based on an officer's observation of a driver's possession of a hypodermic syringe and knowledge of the driver's use of the syringe to take illegal drugs. *See* ***Wyoming v. Houghton***, 526 U.S. 295, 298, 300 (1999). Likewise, Rucker's observations of the unsterile hypodermic needles in Manlick's immediate vicinity, combined with his knowledge of such needles' use to inject illegal drugs and Manlick's recent arrest for possession of illegal drugs, provided probable cause to believe that the vehicle contained evidence of a crime such that he could search Manlick's vehicle without a warrant. The trial court properly denied Manlick's motion to suppress.

Manlick's Counsel Was Not Ineffective

¶12 Manlick next argues she received ineffective assistance of counsel based on her counsel's failure to argue at the suppression hearing that hypodermic needles are expressly excluded as "drug paraphernalia" under WIS. STAT. § 961.571(1)(b)1. To support such a claim, Manlick must show both that counsel was deficient and that this deficient performance prejudiced Manlick. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components if Manlick makes an insufficient showing on one. ***Id.*** at 697. We will uphold the trial court's findings of fact unless clearly erroneous, but whether counsel ultimately provided ineffective assistance is a question of law that we review de novo. ***State v. Pinno***, 2014 WI 74, ¶37, 356 Wis. 2d 106, 850 N.W.2d 207.

¶13 Accepting the trial court's finding that Manlick's counsel was deficient when she "simply forgot" to argue at the suppression hearing that the hypodermic needles are not drug paraphernalia under WIS. STAT. § 961.571(1)(b)1., we find that counsel was not ineffective as Manlick was not prejudiced by counsel's deficient performance. As we already have discussed, Rucker had probable cause to search Manlick's vehicle for evidence of criminal activity—§ 961.571(1)(b)1. notwithstanding. Manlick's motion to suppress would have been denied regardless of counsel's failure to argue that Manlick could not be charged with a crime for possession of drug paraphernalia under § 961.571(1)(b)1., and therefore, Manlick was not prejudiced by this failure.

Conclusion

¶14 As Rucker had probable cause to search Manlick's vehicle based on his observation of unsterile hypodermic needles in the vehicle and his knowledge of Manlick's drug history, the court properly denied Manlick's motions to suppress and vacate her convictions.

By the Court.—Judgment and order affirmed.

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