COURT OF APPEALS
DECISION
DATED AND RELEASED

July 29, 1997

NOTICE

No. 96-2344-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARNETTA JOHNSON AND RHONDA YOUNG,

DEFENDANTS-APPELLANTS.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed in part; reversed in part and cause remanded with instructions.*

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

PER CURIAM. Darnetta Johnson and Rhonda Young appeal from judgments convicting them of two counts of possession of a controlled substance with the intent to deliver, one count of failure to pay a controlled substance tax, party to a crime, and one count of keeping a drug house, party to a crime. *See*

§§ 161.16(2)(b)(1), 161.41(1m)(cm)(2), 939.63, 939.05, 161.14(4)(t), 161.41(1m)(h)(1), 139.87(1) & (2), 139.88(1), 139.89, 139.95(2), 161.01(14), and 161.42, STATS. Johnson and Young also appeal from an order of the trial court denying their postconviction motion for a new trial. Johnson and Young claim that: (1) the trial court erred in denying their motions to suppress evidence; (2) the trial court erred by allowing Johnson's pre-***Miranda*** statements into evidence;[1] and (3) there was insufficient evidence to convict them. We affirm in part, reverse in part and remand to the trial court.

Johnson and Young were each convicted of four counts of drug crimes: possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, failure to pay the controlled substance tax and keeping a drug house both as party to a crime. On November 30, 1995, at 10:40 a.m. a search warrant was issued for 2235 N. 39th Street in Milwaukee. The search warrant was for a black male, and sought illegal drugs and equipment used to package the drugs. On December 5, 1995, at 5:50 p.m. the warrant was executed. Upon entry into the residence the Milwaukee county police encountered Johnson and Young, and found marijuana, cocaine, and drug-related equipment. Johnson was carrying approximately $2000 in cash. Prior to trial, Johnson and Young filed a motion to suppress the evidence obtained arguing that the search warrant was not timely executed and returned. The trial court denied the motion. Johnson also moved the trial court to exclude her statement to the police that she resided at 2235 N. 39th Street because she had not been given her ***Miranda*** warnings prior to giving the statement. The trial court denied Johnson's motion.

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Johnson and Young first contend that the search warrant was not returned within the five-day period provided for by § 968.15, STATS., and, therefore, is void.[2] The State argues that the return of the warrant was made within forty-eight hours of its execution, as required by § 968.17, STATS., and, further, any technical failure to comply with the return requirement in § 968.15(1) was a technical defect that did not affect any of Johnson and Young's substantial rights. Section 968.22, STATS., provides:

> **Effect of technical irregularities.** No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant.

The return of a warrant and the filing of an affidavit is ministerial and does not affect the validity of a search warrant absent a showing of prejudice to a defendant. *See* ***State v. Elam***, 68 Wis.2d 614, 620, 229 N.W.2d 664, 668 (1975). Here, the search warrant was issued on November 30, 1995, executed on December 5, 1995, and returned on December 6, 1995. Johnson and Young have failed to show any prejudice in the failure to comply with the five-day requirement.

Johnson and Young's next allegation is that the trial court erred in admitting incriminating statements made by Johnson and Young. Johnson stated

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[2] Section 968.15, STATS., provides:

> **Search warrants; when executable. (1)** A search warrant must be executed and returned not more than 5 days after the date of issuance.
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> **(2)** Any search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it.

The warrant was executed within the five-day period.

that she lived at the residence that was searched, and Young stated that she had been staying at that residence for the past few weeks. During a suppression hearing, the trial court concluded, based upon an officer's testimony who had transcribed the statements, that he had mistakenly written in his report that he read the search warrant and the ***Miranda*** warnings to Johnson and Young after inquiring as to Johnson and Young's names and addresses. The officer testified that the written report was in error and that he had read the search warrant and the ***Miranda*** warnings *before* questioning Johnson and Young. The trial court expressly found the officer's testimony on this issue to be credible. A trial court's findings of fact will not be overturned on appeal unless clearly erroneous. Section 805.17(2), STATS. We will not substitute our judgment for that of the trial court. *See* ***State v. Hanson***, 136 Wis.2d 195, 213, 401 N.W.2d 771, 778 (1987).

Johnson and Young next claim that there is insufficient evidence to sustain their convictions.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted). Our review of the facts of record leads us to conclude that the evidence was not so lacking in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. The only people in

the house at the time of the arrests were Johnson, Young and a child. The drugs and related paraphernalia were out in the open and Johnson had approximately $2000 in cash on her. There was testimony that both Johnson and Young told a police officer that they lived at 2235 N. 39th Street. Further, there was testimony that Johnson initially identified herself as "Kim Buford" and that a driver's license was found at 2235 N. 39th Street with the name "Kim Buford" and with 2235 N. 39th Street listed as "Kim Buford's" address. The evidence of Johnson and Young's guilt was compelling.

Finally, because the supreme court recently struck down the drug stamp law as unconstitutional, we also reverse and remand, instructing the trial court to vacate the drug stamp law convictions. *See* ***State v. Hall***, 207 Wis.2d 54, 67–68, 557 N.W.2d 778, 783 (1997).

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded with instructions.

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