COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1789-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSCOE PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Roscoe Patterson appeals from the trial court's refusal to suppress drug evidence which the police discovered while they were investigating a crime scene in Patterson's apartment. Patterson later pled guilty to possession of cocaine with intent to deliver. Because we conclude that the drug

evidence was in plain view when it was found by the police during their investigation of another crime, we affirm.

On September 18, 1995, police responded to Patterson's call for assistance at his residence. Patterson reported that the apartment had been broken into and that his companion and their son had been assaulted. Patterson interrupted the attack and drove off the perpetrators before calling the police. The police responded to the home invasion complaint. Patterson admitted the police to the apartment and his companion and their child were taken to the hospital. Although injured, Patterson remained at the apartment. Patterson was later transported to view the suspects who had been apprehended in a traffic stop. Other officers remained at the apartment and Patterson later returned.

Sergeant John Rohde testified at the suppression hearing that he and other officers surveyed the apartment crime scene for evidence collection purposes. During this survey, Detective Ken Kopesky noticed marijuana roaches[1] in an ashtray next to the bed where the companion was attacked and showed them to the other officers present. When Patterson returned to the apartment, Kopesky confronted him about the roaches and Patterson admitted that they were his and signed a consent to search the apartment. Rohde testified that Patterson was not in custody when he signed the consent form and that he had not asked police to leave the apartment. The police evidence technician testified that he did not notice the marijuana roaches until Kopesky pointed them out to him.

[1] The evidence technician described marijuana roaches as the end of a marijuana joint or cigarette.

Kopesky, who was in the apartment to investigate the home invasion, testified that he found marijuana roaches in an ashtray next to Patterson's bed in the room where the victims were assaulted. The roaches were plainly visible in the ashtray next to the bloodstained bed. Officers did not search the apartment based upon their discovery of the roaches until Patterson gave his consent to search. When Patterson returned to the apartment after identifying the suspects at the traffic stop, Kopesky asked him if the roaches were his. Patterson stated that they were and gave consent to search the apartment.[2] More marijuana, cocaine and drug paraphernalia were found during the ensuing search. Patterson never revoked his consent, did not ask to speak to an attorney and did not have any questions regarding the consent form. Prior to giving consent, Patterson was not restrained or in custody.

Patterson testified that the officers opened a locked closet and searched it for drugs before he returned to the apartment. He acknowledged that he had a right to refuse to consent to a search. Patterson claimed that the police misrepresented to him that his companion had given her consent to search the apartment.

In rebuttal, Kopesky testified that he never told Patterson his companion had consented to the search. He further stated that the search for drugs and drug-related items did not begin until after Patterson returned and consented.

The court rejected Patterson's testimony that the police searched a locked closet and found drugs and drug paraphernalia before he returned from

[2] Kopesky testified that the companion informed another officer that she and Patterson signed the apartment lease. The companion refused, from the hospital, to consent to a search of the apartment. Consent to search is not an issue on appeal.

identifying the suspects. The court also rejected Patterson's contention that he signed the consent form because he felt he had no choice given what the police had already found in the locked closet.

The court found that the officers were invited by an emergency call into the apartment and were therefore lawfully in the apartment when the marijuana roaches were found. The officers had been processing the crime scene for evidence when the roaches were found. The court noted that while Kopesky had a hunch that the home invasion was related to drugs, that hunch did not taint the discovery of the roaches because they were in plain view. The detective's experience permitted him to conclude that the objects in the ashtray were marijuana roaches and that the roaches had an apparent incriminating nature which provided probable cause to believe that the roaches were related to criminal activity. Furthermore, Patterson consented to the search. The trial court denied Patterson's motion to suppress and he later entered a guilty plea.

On appeal, Patterson argues that the plain view exception to the requirement of a search warrant does not apply because: (1) the roaches were not open and obvious, and (2) the roaches were found after a second, more intrusive search of Patterson's bedroom for drugs.

On review, we will uphold the trial court's findings of fact if they are not clearly erroneous, and we independently apply the constitutional principles of reasonableness of the search under the Fourth Amendment to the United States Constitution to the facts found by the trial court. *See* ***State v. Phillips,*** No. 95-2912-CR, slip op. at 13 (Wis. May 22, 1998).

A warrantless search is permitted when evidence is in plain view of the officer. *See* ***State v. Altenburg,*** 150 Wis.2d 663, 667, 442 N.W.2d 526, 528

(Ct. App. 1989). Under the plain view doctrine, "[o]bjects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." ***State v. Edgeberg,*** 188 Wis.2d 339, 345, 524 N.W.2d 911, 914 (Ct. App. 1994) (quoted source omitted). "A person has no reasonable expectation of privacy in an item that is in plain view." ***Id.*** Seizure of an item in plain view does not constitute a search for purposes of the Fourth Amendment's prohibition on unreasonable searches. *See* ***id.*** at 344-45, 524 N.W.2d at 914.

An item is subject to seizure under the plain view doctrine when: (1) the officer has a prior justification for being in the position from which the plain view discovery was made; (2) the evidence was within plain view of the discovering officer; and (3) the item seized, by itself or in combination with facts known to the officer at the time, provides probable cause to believe that there is a connection between the evidence and criminal activity. *See* ***id.*** at 345, 524 N.W.2d at 914.

Patterson argues that the officers were looking for drugs, not for evidence of home invasion, when the marijuana roaches were found. Therefore, the officers had no legal justification to be in a position to find the roaches. Patterson's argument is at odds with the trial court's findings of fact. The court found that officers were on the premises pursuant to the home invasion call, were processing the crime scene for evidence and were therefore lawfully in the apartment when the roaches were found. The fact that the evidence technician did not notice the roaches is not relevant. Kopesky, who was also investigating, observed the roaches in an ashtray at the crime scene. The trial court's findings regarding the manner in which the roaches were discovered are not clearly erroneous based upon the record of the suppression hearing.

Patterson relies on ***Arizona v. Hicks***, 480 U.S. 321 (1987), in support of his contention that the roaches were not in plain view. ***Hicks*** is distinguishable because in ***Hicks*** the officers moved the stereo equipment to obtain the serial numbers on a hunch that the equipment was stolen. However, the nature of the stereo equipment did not suggest criminal activity. *See* ***id.*** at 323-28. Here, in contrast, the officers did not need to disturb the roaches in order to notice them and it is beyond dispute that marijuana roaches suggest criminal conduct.

Finally, Patterson argues that the roaches were not in plain view because Kopesky tipped the ashtray to show them to other officers. We disagree. It is irrelevant whether the detective had to tip the ashtray; he found the roaches in an open and obvious place at the crime scene. Far from being obscured or hidden, the roaches were merely overlooked by other officers on the scene. The detective need not have shared his discovery with other officers before seizing the roaches under the plain view doctrine. *See* ***Edgeberg,*** 188 Wis.2d at 345, 524 N.W.2d at 914 (evidence must be in plain view of discovering officer).

We uphold the plain view seizure of the marijuana roaches. Because the plain view seizure did not constitute a Fourth Amendment search, *see* ***id.*** at 344-45, 524 N.W.2d at 914, the subsequent consent to search and search were permissible and were not tainted by the discovery and seizure of the roaches.

By the Court.—Judgment affirmed.

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