COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1815-CR **Cir. Ct. No. 2013CF4911**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW S. SATO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO and WILLIAM S. POCAN, Judges. *Affirmed*.

Before Brennan and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 LaROCQUE, J. Andrew Sato appeals a judgment of conviction for robbery by threat of force contrary to WIS. STAT. § 943.32(1)(b) (2013-14),

entered upon a plea of guilty, as well as the order denying his motion for postconviction relief.[1] He challenges the denial of his motion to suppress evidence seized pursuant to a search warrant, and he relies upon evidence that the police unlawfully entered the curtilage area outside his apartment to obtain the exigent circumstance used to justify a warrantless entry and arrest. He would have the court apply the "fruit of the poisonous tree" doctrine to the post-arrest search warrant.

¶2 Even if a curtilage violation occurred and there were no exigent circumstances justifying a warrantless entry, we conclude that the search and seizure at issue were nevertheless sufficiently attenuated from the preceding events so as to avoid the exclusionary rule. We therefore affirm the judgment and order.[2]

HISTORICAL FACTS

¶3 The circuit court held two pretrial evidentiary hearings that revealed the following events.

[1] All references to the Wisconsin statutes are to the 2013-14 version unless otherwise noted.

Sato was initially charged with one count of armed robbery contrary to WIS. STAT. § 943.32(2). After his motion to suppress was denied, Sato reached an agreement to plead to a lesser form of robbery, reducing his exposure from forty years to fifteen years. He received eight years of initial confinement and five years of extended supervision. WISCONSIN STAT. § 971.31(10) permits review from a final judgment or order notwithstanding the fact that it was entered upon a plea of guilty.

[2] Judge Yamahiro decided the pretrial suppression motion. Judge Pocan decided the postconviction motion.

¶4 A delivery driver for Gold Rush Chicken in the City of Milwaukee called the police shortly after 11:00 p.m. on October 28, 2013, to report an armed robbery. The driver stated that someone had placed a phone order for food delivery at about 10:39 p.m. to 6221 West Fairview in Milwaukee. Upon his arrival, no one at that address claimed the order, so from outside the residence, he called the phone number from which the order emanated. Immediately, a cell phone in the possession of a man standing nearby "lit up." As the man approached the delivery car, the driver rolled down the passenger side window. The passenger seat contained pizza, chicken, and approximately $50 in cash. The man reached in to grab the food, and the driver told the man, "you have to pay first." The man replied: "I got your money here," displayed a gun in his right hand, grabbed the food, and ran to the rear of the nearby buildings. He turned west toward the rear of 6225 West Fairview (later established by the police as the location of Sato's apartment), but the delivery man failed to see him enter that address.

¶5 The next morning, October 29, 2013, Milwaukee police officer Steven Strasser, a twenty-three year veteran who had worked the robbery patrol squad for the past nine or ten years, began his investigation. First, he learned that the phone number used to place the food order was associated with a person at 6311-A West Fairview, less than a block from the crime scene. He then spoke to a woman at that address around 9:00 a.m. who informed him that the phone number belonged to her brother, K.M., who was currently there but asleep.

¶6 After the woman woke K.M. up, K.M. confirmed the phone number in question belonged to him, and he then told Officer Strasser that he had spent the previous evening at 6225 West Fairview at the apartment of his friend, S.Z. He told Strasser that about twelve hours earlier, around 10:30 p.m. the prior evening, he and S.Z. were watching the World Series on television when Sato came into the

room and asked to borrow a phone to place a food order. K.M. lent him his phone, Sato left for twenty or thirty minutes, returned "kind of out of breath," and said: "[I]f the pizza guy calls, don't answer." K.M. told Strasser he had known Sato for several months as S.Z.'s next door neighbor and that Sato lived in apartment #3 with his girlfriend.

¶7 Strasser next went to 6225 West Fairview and located S.Z. in apartment #2. S.Z. confirmed K.M.'s report regarding the previous evening and that Sato's residence was right next door. When Strasser asked whether Sato was home, S.Z. replied: "Yes. I heard them. They're in there now."

¶8 Strasser testified that he immediately formed a plan to "knock and talk" after learning Sato was at home. Strasser stated that if Sato answered the door, the initial plan was to arrest him based on probable cause and to "freeze" the scene until he obtained a search warrant. If Sato did not answer, the plan was still to "freeze the scene" and get the search warrant. The front door to Sato's apartment was the only entry to the apartment, although there were "common area" front and rear doors to the building itself.

¶9 Strasser explained that there were three police officers with him, two of whom, Scott Iverson and Gary Post, knew Sato and had been to this location previously. Iverson joined Strasser at Sato's front apartment door, while Post was posted at an east bedroom window of Sato's apartment and Officer Bodo Gajevic was posted at a south window. To conduct the "knock and talk," Strasser yelled: "This is the police. Mr. Sato open the door. We know you guys are in there. Open the door." He knocked, yelled, and pounded for about five to ten minutes. Sato did not answer the door, and after five to ten minutes, Post relayed that he

had heard loud noises from inside the bedroom. At that point, things did not go as Strasser had initially planned.

¶10 After Post heard loud noises inside Sato's apartment, Strasser decided he could no longer wait for Sato to answer the door or to secure the apartment from outside while he went for a search warrant. He explained: "I had to make a [new] plan … I did believe that evidence is being destroyed, I'm going to have to force the door open." Strasser kicked the door in, located Sato, placed him in custody, and had him conveyed to the police station. Sato's girlfriend was not arrested and stayed on the couch. Strasser advised the officers to "freeze" the scene and then left to prepare the affidavit for a search warrant, which he submitted to an assistant district attorney who approved it as to content. Strasser had not searched the apartment for evidence before he left to draft an affidavit.

¶11 When asked what factors he had considered in deciding to kick in Sato's door, Strasser said "[s]afety and destruction of the evidence … this is an armed robbery. The suspect in this [case] was armed with a gun, and we know Mr. Sato had a violent history based upon his previous arrests." Asked explicitly about "exigent circumstances," Strasser told the court that based on his training and experience—nine or ten years on the robbery squad—food items could be destroyed, receipts destroyed, and cell phones hidden or contents deleted. Asked how he could be concerned about the cell phone used during the offense given it was already in police possession, he explained that in his experience, robbery suspects often have multiple phones that may contain relevant evidence.

¶12 Post, the officer who heard movement from inside Sato's apartment from his location right outside the bedroom window, testified at both evidentiary hearings. What follows is an amalgam of his testimony.

¶13 Post knew Sato from a prior contact at the apartment a couple of months prior to the robbery incident, and as a result, he had been inside the apartment previously and knew its layout. Post offered testimony concerning the layout of the apartment building, which contained six units—three units on the bottom floor and three on the top—and the area outside Sato's bedroom window where Post was located.

¶14 In regard to the exterior, Post confirmed that outside of Sato's window, a brown fence runs along the property line from the garage on the neighboring property to approximately the second of four windows on the side of Sato's apartment building. A photo shown to Post revealed that the fence ends at a chain link fence and gate across the driveway of the neighboring house, which encloses that house's backyard. In other words, the fence enclosed the neighbor's property, not Sato's apartment building. Post described the area between the fence and the apartment building—which was referred to as a "gangway" or passageway—as being "[s]ix to eight feet" wide. When asked, Post agreed there was a window well underneath Sato's window and that although people may use the area as a shortcut, the area was not a public area.

¶15 On the day of the arrest, October 29th, Post was assigned to "contain" or "cover" the rear of the apartment building "on the outside" in the area outside the bedroom window. Shown a photo to demonstrate exactly where he was standing, Post indicated he was standing between a drain pipe running up and down the exterior wall and the window and that he was "right near the window." Asked why he stood so close to the window rather than behind the neighbor's fence or the sidewalk or backyard, he explained that he stood near the window "in case an actor would try to escape out" and that his extensive experience had taught him that people can jump out and escape "remarkably fast" and sprint away.

¶16 Post recalled that after hearing silence from within Sato's apartment for the first five or ten minutes after the officers at the front door announced their presence, he then heard sounds and went "closer to the window to try to verify that." He stated the sounds he heard were "like shuffling," "like he's moving furniture," and "then there was like a heavy item that must have fell." When asked if he had his ear to the glass of the window, Post replied: "At first, I didn't have it as close. But then when I heard movement in there, I went closer to listen …." Post relayed what he heard to the other officers, at which point the other officers entered Sato's apartment.

¶17 Post entered the apartment after Strasser and the other officers had already entered. He described what he did next: "I did look around. There was no other persons there, and then I stayed with his girlfriend for quite some[]time." Asked what "look around" meant, he said "I mean see if it was just the two. We weren't communicating as far as who had done what, and I just wanted to make sure there was no one else there."

¶18 Officer Strasser obtained a search warrant, and the search pursuant to the warrant led to seizure of a Gold Rush Chicken bag from a trash can, buns and slaw in the refrigerator, a pizza box located behind a dresser, and items identifying Sato. Ultimately, the State filed a criminal complaint identifying Sato as the perpetrator, and Sato moved to suppress evidence on two grounds: (1) an illegal entry and search of his home had occurred due to a curtilage violation and absence of exigent circumstances; and (2) that a ***Franks-Mann***[3] violation had

[3] *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978) and ***State v. Mann***, 123 Wis. 2d 375, 385-90, 367 N.W.2d 209 (1985).

occurred because the affidavit for the search warrant did not clearly state that the officers had already entered Sato's apartment.

¶19 The circuit court held multiple hearings to address Sato's suppression motion, which it ultimately denied. Regarding the ***Franks-Mann*** challenge, the circuit court concluded that the omission of information that officers had already entered Sato's apartment did not negate the rest of the affidavit, which set forth probable cause. As to Sato's illegal entry and search argument, the circuit court concluded that there had been no curtilage violation and that there had been no exigent circumstances to support the warrantless entry. However, because the circuit court also concluded that the search pursuant to the warrant was sufficiently attenuated from the warrantless entry, it denied Sato's motion.

¶20 After pleading guilty to an amended charge of robbery with threat of force, Sato filed a postconviction motion for relief seeking reconsideration of the earlier order denying his suppression motion. The postconviction court stood by the earlier finding that the search pursuant to the warrant was sufficiently attenuated from the warrantless entry into Sato's home and denied the motion. This appeal follows.

STANDARD OF REVIEW

THE ATTENUATION QUESTION

¶21 For the purpose of this opinion, we assume, without deciding, that there was a curtilage violation and that there was no exigent circumstance. We do so based on our conclusion that even if a curtilage violation occurred and no exigent circumstance supporting the warrantless entry existed, the search pursuant to the warrant was sufficiently attenuated so that the exclusionary rule does not apply.

¶22 The State bears the burden of "prov[ing] the admissibility of evidence after the primary taint of a constitutional violation has been established." ***State v. Harris***, 2016 WI App 2, ¶9, 366 Wis. 2d 777, 874 N.W.2d 602 (2015). Spoiled evidence is often described as "fruit of the poisonous tree." *See* ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963). To determine if the taint is purged, case law looks to three factors: (1) the temporal proximity of the arrest and the evidence in question; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official's misconduct. ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975); ***State v. Artic***, 2010 WI 83, ¶5, 327 Wis. 2d 392, 786 N.W.2d 430. The third factor looks to whether the evidence seized pursuant to a warrant is attributable to the "'exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint.'" ***State v. Phillips***, 218 Wis. 2d 180, 206, 577 N.W.2d 794 (1998) (citations omitted).

¶23 In ***Segura v. United States***, 468 U.S. 796 (1984), the United States Supreme Court addressed the question of "whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the entry into the residence." ***Id.*** at 797-98. In answering that question, the Supreme Court concluded that "it is clear from our prior holdings that 'the exclusionary rule has no application [where] the Government learned of the evidence' from an independent source." ***Id.*** at 805 (one set of quotations and citation omitted; bracket in ***Segura***). "It has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.'" ***Id.*** (citation omitted).

DISCUSSION

THE ATTENUATION QUESTION

¶24 As noted above, our discussion is based on the assumption that a curtilage violation occurred and that there were no exigent circumstances. Accordingly, to determine whether there was sufficient attenuation to conclude that the evidence recovered pursuant to the warrant need not be excluded, we consider each of the ***Brown*** factors, beginning with the temporal proximity of the arrest and the evidence in question. Here, Sato concedes that the timing of the events is of little or no importance. The State tacitly agrees, doing little more than estimating that three to four hours passed between the unlawful entry and the search pursuant to the warrant and providing no further argument on this factor. We agree that this factor is of little importance and do not consider it further.

¶25 We next consider whether there were any intervening circumstances. Sato maintains that there were no meaningful intervening circumstances; however, we disagree. Testimony introduced at the suppression hearings established that after the officers entered Sato's apartment, the officers maintained the status quo—e.g., they "froze" the scene and did not conduct a search—while Strasser applied for and obtained a search warrant. That the officers "froze" the scene and did not actually search Sato's apartment is a mitigating factor under these circumstances. Moreover, in drafting his affidavit in support of the search warrant, Strasser relied upon evidence the officers acquired prior to attempting the "knock and talk."

¶26 Finally, we consider the purpose and flagrancy of the misconduct. Strasser testified at the suppression hearing that his plan, after learning that Sato lived next door to one of the witnesses and that Sato was at home at the time, was

to "freeze" the scene and obtain a search warrant prior to searching Sato's apartment regardless of whether Sato actually answered the door when the officers attempted the "knock and talk." The officers consistently kept to this plan and did not perform a search until a warrant had been obtained. While Post did testify that he made a brief sweep of the unit, he explained that he did so for the sole purpose of determining whether there were any other individuals in the apartment. The trial court here found no evidence of bad faith, which is essentially a credibility determination that we review as a finding of fact under the clearly erroneous standard. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (in the absence of explicit credibility findings, "we assume [the circuit court] made implicit findings on a witness'[s] credibility when analyzing the evidence" and we will not disturb that implicit finding unless it was clearly erroneous). The circuit court's finding here was not clearly erroneous.

¶27 It is also important to consider the context of the specific facts at hand. Here, the police were investigating a reported armed robbery with a firearm that had been committed only hours earlier by a person still at large. At the exact same time they acquired compelling evidence that Sato had been the perpetrator of the alleged crime, they also learned that not only did he live in the adjacent apartment to where they were interviewing a potential witness, S.Z., but also that he was home at that exact moment. Moreover, the officers had knowledge of Sato's prior violent criminal behavior, and there was reason to believe that Sato may be armed. There is no doubt that the mere sense of urgency revealed by these facts does not excuse any unlawful misconduct which we again assume occurred for the purpose of this analysis; however, that sense of urgency is a factor to weigh in our decision as to whether the exclusionary rule applies here.

¶28 Finally, we also note that Sato characterizes Strasser's failure to disclose the warrantless entry to his apartment in the affidavit supporting the search warrant as flagrant misconduct.[4] In making this argument, Sato points to the fact that the trial judge initially expressed concern that this information was absent in the search warrant affidavit. An examination of the affidavit, however, demonstrates that any such concern was unwarranted. First, paragraph six of the affidavit describes the conversation the officers had with K.M., whose phone Sato had used the previous evening. That paragraph states that K.M. told the officers he had been at his friend's apartment—apartment #2 at 6225 West Fairview Avenue—the previous evening, that Sato had come in and asked to borrow a phone, that Sato returned approximately twenty minutes later out of breath and told K.M. not to answer the phone if the pizza guy called, and that K.M. knew that Sato lived next door to his friend in apartment #3. Paragraph seven states that K.M. showed the officers where Sato lived—apartment #3 at 6225 West Fairview Avenue—and paragraph eight of the affidavit states: "That affiant, along with additional City of Milwaukee police officers, did *then* proceed to … Apt. 3, where

[4] As previously explained, Sato raised a ***Franks-Mann*** challenge to the search warrant. In rejecting Sato's ***Franks-Mann*** challenge, the circuit court stated that it did not "find this omission that entry had been made into the home, that that negates the balance of the affidavit, which does set forth probable cause." On appeal, Sato "does not necessarily dispute [the circuit court's] finding," but instead raises the absence of such information "in the context of his attenuation analysis." Accordingly, we, too, consider the absence of information in Strasser's affidavit that the officers had already entered Sato's apartment only in the context of our attenuation analysis.

Moreover, we summarily reject Sato's argument that the failure to expressly report the warrantless entry constitutes a ***Franks-Mann*** issue. *See* ***Franks***, 438 U.S. 155-56, and ***Mann***, 123 Wis. 2d at 385-90. These cases deal with exclusion of a search based upon an intentional and reckless false statement in an application for a search warrant which was necessary to a finding of probable cause.

Andrew S. Sato … was located and arrested for this armed robbery." (Emphasis added.)

¶29 The use of the word "then" in paragraph eight of the affidavit should not be glossed over. "Then" is defined to mean: (1) at that time; (2) soon afterward, next in time; (3) next in order. *Then*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2001). Thus, it can readily be inferred that after learning Sato had used K.M.'s phone to place a food order the previous evening and after learning Sato's address, the officers *then* proceeded to Sato's apartment and came into contact with him because, as the affidavit states, Sato was "located and arrested for this armed robbery." Ironically, but accurately, Strasser's affidavit also reminds the magistrate that "[c]ourts have determined that probable cause is not a technical, legalistic concept but a flexible common-sense measure of the plausibility of specific conclusions; that elaborate specificity is not required and that probable cause may be supported by inferences, as well as facts."

¶30 For the foregoing reasons, the State has met its attenuation burden, and we affirm the circuit court's judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.