COURT OF APPEALS DECISION DATED AND FILED

September 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP532-CR

Cir. Ct. No. 2004CM235

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KIMBERLY M. DESIMONE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 BROWN, J.[1] The State appeals from a grant of a motion to suppress, claiming that Kimberly M. Desimone abandoned a cigarette case when, during a thunderstorm, she placed it in a mailbox not belonging to her. The case

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

contained a plastic tube and a small folded bindle of cocaine. We agree with the trial court that Desimone did not abandon her property. In our view, this is a temporary relinquishment case, not an abandonment case. We affirm.

¶2 On May 17, 2004, at about 10:45 p.m., two police officers from the Village of Fontana encountered Desimone at the request of an Abbey Springs Resort security guard who had observed her walking along a street in a driving rainstorm. The officers observed Desimone pacing back and forth. She was obviously wet and shivering. The officers further observed that she had slurred speech and appeared intoxicated. They inquired as to why she was out in the rain and asked for identification. She informed the officers of her name. The officers checked the name but were unable to confirm it. The officers then asked Desimone for a middle name. This time, Desimone gave the officers the correct spelling of her last name, her middle initial and her driver's license number. The officers learned that she was staying with a male individual just up the street. Exercising their community caretaker function, they were prepared to take her either back to the home or to the station, whichever location she chose.

¶3 Desimone volunteered that she had placed her cigarettes, wallet and keys inside a mailbox so that the items would not get wet and because she was afraid of lightning. After Desimone voluntarily entered the squad car, one of the officers asked the security guard to attempt to locate the items that had been placed in the mailbox. Desimone had, at some point, told the security guard that the items were in Mailbox 131 and that is where he found them. The guard returned to the squad car and handed the items from the mailbox to one of the officers. The officer opened the cigarette case and found the contraband. The officer justified the search as an attempt to confirm Desimone's identification since she had told the officers that her identification was inside the case.

¶4 The State conceded that, prior to the search, the officers already had sufficient information as to Desimone's identification. Also, it does not contend that, up to this point, she had committed a crime or was suspected of having committed a crime. The State contended, however, that when Desimone placed the items in a mailbox that she did not own, she abandoned those items because she had no legitimate expectation of privacy in them. Once abandoned, the State theorized that the officers had every right to look into the case.

¶5 The trial court disagreed. The court could find no suggestion from the record that there were hundreds of mailboxes in close proximity. Desimone knew the mailbox number and the security guard found them "just like she said." The trial court reasoned that it is not implausible for a person, caught in a driving rainstorm where there is lightning about, to want to put personal items in a drier place temporarily. In the trial court's view, if property is left in a dry place temporarily to keep items out of the rain, and the person comes back later to retrieve the property, "it's now private again." The trial court granted the motion to suppress.

¶6 The State subsequently moved for reconsideration. The trial court denied the motion to reconsider and the State now brings this appeal.

¶7 The standard of review here is that the trial court's findings of fact will be upheld unless they are clearly erroneous, but whether the search passes constitutional muster is a question of law that this court decides de novo. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995).

¶8 The State's theme in this appeal is that when Desimone placed her personal items in the private mailbox of someone she did not know, she could not reasonably have expected to retain a legitimate privacy interest in that property.

This is because she no longer had dominion or control over the property. The State likens this case to that of ***City of St. Paul v. Vaughn***, 237 N.W.2d 365 (Minn. 1975), where a person, while being pursued by police, hurriedly ran into a cleaning establishment and hid drug paraphernalia beneath the counter. *See* ***id.*** at 367, 370. The State also cites 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.6(b), at 575-76 (3d ed. 1996), for the proposition that even an inadvertent leaving of effects in a private place can amount to a loss of any justified expectation of privacy.

¶9 We agree wholeheartedly with the State that this case rises or falls based on the concept of reasonableness. The United States Supreme Court, the federal courts, and our state courts make clear that it is possible for a person to retain a property interest in an item but nonetheless relinquish the reasonable expectation of privacy in an object. *See, e.g.,* ***United States v. Thomas***, 864 F.2d 843, 845 (D.C. Cir. 1989). ***Thomas***, in fact, involved a similar situation to the ***City of St. Paul*** case cited by the State. There, a defendant being followed by police abandoned his gym bag by leaving it at the top of the stairs in a public hallway. *See* ***Thomas***, 864 F.2d at 845.

¶10 But the same court that decided ***Thomas*** distinguished that case in ***United States v. Most***, 876 F.2d 191 (D.C. Cir. 1989). The facts in ***Most*** were that the defendant entered a grocery store carrying a bag. ***Most***, 876 F.2d at 192. The store's policy was that customers were required to check their bags while they shopped. ***Id.*** Most asked one of the store clerks if she would watch his bag and the clerk placed the bag on the floor underneath the checkout counter. ***Id.*** When leaving, Most asked one of the store clerks if she would continue to watch the bag for him. ***Id.*** The court differentiated this situation from ***Thomas***. It wrote, "[A] person does not abandon his property whenever he temporarily relinquishes direct

control over his belongings." ***Most***, 876 F.2d at 196-97. And the court cited ***Thomas***, 864 F.2d at 846, for the proposition that "the law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment." *See* ***Most***, 876 F.2d at 197. The court then held that the case before it was a "temporary relinquishment case" rather than an "abandonment case." *See* ***id.*** It noted that Most never denied ownership of the bag and possessed the ability to retrieve the bag at a later time. ***Id.*** The court noted that whether a person had the ability to retrieve personal belongings "would depend on the fortuity that others with access would disturb [the property]." *See* ***id.*** (citation omitted). In ***Thomas***, the issue boiled down to the fortuity that other persons with access to the public hallway would not disturb Thomas' bag while it lay unattended. *See* ***Most***, 876 F.2d at 197. The ***Most*** court differentiated the case before it by reasoning that Most understood that the clerk would protect the property from intrusion by the public although Most himself had departed from the store. ***Id.*** Bottom line, the difference in the two cases was whether the property was within reach of the public generally. *See* ***id.*** at 198. That is an ultimate test of "reasonableness" which transcends form and relies on substance. As such, we will use it here.

¶11 Here, Desimone was within close proximity to Mailbox 131 the whole time. She not only did not disclaim ownership, she wanted her items back, and she knew where the items were located. She obviously put them in the mailbox with the intent that they would be there only temporarily—until the rain subsided. And of equal importance, the fortuity that other persons would have access to and be able to disturb or take the property during the rainstorm, while she remained in close proximity, had to be small—from the standpoint of any

reasonable person. Thus, we agree with the trial court that this is a case of temporary relinquishment and not abandonment.

¶12 The authorities cited by the State are inapposite. In ***City of St. Paul***, there was certainly no intent to only temporarily relinquish the contraband with the intent to retrieve it; rather, it was obvious that the defendant was intent on disassociating himself from possession altogether before police were able to apprehend him. *See* ***City of St. Paul***, 237 N.W.2d at 370-71 & n.11. The bag was discarded, left behind. ***Id***. And the LaFave citation deals with the *inadvertent* leaving of items in a private place, a situation not relevant to the case at bar. We affirm.

By the Court.—Order affirmed.

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