COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1173-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES W. RICE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] James W. Rice, Jr. appeals from a judgment convicting him of possession of THC, in violation of WIS. STAT. § 961.41(3g)(e)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

(1997-98),[2] and possession of drug paraphernalia, in violation of WIS. STAT. § 961.573(1).[3] Rice contends that his motion to suppress a baggie of marijuana should have been granted because he did not consent to a search that produced it. He also contends that the trial court should have granted his motion to dismiss because he was unlawfully arrested based on an illegal search. Because the trial court's findings of fact were not clearly erroneous, and because we conclude that Rice voluntarily produced the baggie, we conclude that the trial court properly denied Rice's motion to suppress. Because we conclude that Rice consented to the

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[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 961.41(3g) states in relevant part:

> No person may possess or attempt to possess a controlled substance or a controlled substance analog unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice, or unless the person is otherwise authorized by this chapter to possess the substance or the analog. Any person who violates this subsection is subject to the following penalties:
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> ….
>
> (e) If a person possesses or attempts to possess tetrahydrocannabinols included under § 961.14(4)(t), or a controlled substance analog of tetrahydrocannabinols, the person may be fined not more than $1,000 or imprisoned for not more than 6 months or both.

[3] WISCONSIN STAT. § 961.573(1) states:

> No person may use, or possess with the primary intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance or controlled substance analog in violation of this chapter. Any person who violates this section may be fined not more than $500 or imprisoned for not more than 30 days or both.

search, he was not unlawfully arrested, and the trial court did not err in denying his motion to dismiss. We therefore affirm.

BACKGROUND

¶2 On October 2, 1999, around 7:30 p.m., Trooper Edward Vacha of the Wisconsin State Patrol noticed a vehicle stopped at the stop lights at Highway 23 South and Highway 18 without its headlights on. Vacha followed the vehicle for a mile, and then stopped it. He approached the vehicle and asked James Rice, the driver, for his operator's license.

¶3 As Rice was trying to produce his license, Vacha noticed the corner of a rolled-up plastic baggie protruding from the breast pocket of Rice's shirt. Vacha was only able to see one-quarter to one-half inch of the baggie protruding, and was unable to see what the baggie contained. He asked Rice what was in the plastic baggie. Rice nervously replied, "nothing," and pushed the baggie down into his pocket and out of view.

¶4 The parties disputed exactly what occurred next. Vacha testified that he asked something to the effect of, "Why don't you hand me that nothing?" Rice testified that Vacha said, "No, let me see that, hand it over, give it to me." Vacha's report read: "I told Rice to give me the bag."

¶5 Rice handed the baggie to Vacha. Vacha found a green leafy vegetable material in the baggie which he recognized as marijuana. He advised Rice that he was under arrest, told Rice to exit the vehicle, and searched him. He found a pipe in Rice's pocket that smelled of burnt marijuana. Vacha tested the leafy material, which tested positive for THC.

¶6 Rice was charged with possession of THC, in violation of WIS. STAT. § 961.41(3g)(e), and possession of drug paraphernalia, in violation of WIS. STAT. § 961.573(1). Rice filed a notice of special appearance, reserving the right to object to the charges on the ground that the court lacked jurisdiction over him. He also filed a motion to suppress the contents of the baggie and the pipe. Finally, he filed a motion to dismiss, contending that the trial court lacked probable cause for the charges. The court denied both motions.

ANALYSIS

¶7 We must first consider whether Vacha's actions constituted a search for purposes of the Fourth Amendment. "Whether a search or seizure has occurred is a question of law subject to de novo review." ***State v. Garcia***, 195 Wis. 2d 68, 73, 535 N.W.2d 124 (Ct. App. 1995). The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Wisconsin courts rely on the Supreme Court's interpretations of the search and seizure provisions of the U.S. Constitution in interpreting the Wisconsin Constitution. *See* ***State v. Fry***, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

¶8 Police may, under certain circumstances, seize evidence that is in plain view, without needing a warrant. *See* ***Coolidge v. New Hampshire***, 403 U.S. 443, 465 (1971). A person has no expectation of privacy in an item that is in plain view. *See* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992). Therefore, no search occurs when police view or feel evidence in plain view. *See* ***id.*** For the plain view doctrine to apply, the object's incriminating character must be immediately apparent, in that the officer must show he or she had probable cause

to believe the item in plain view was evidence or contraband. *See* ***Arizona v. Hicks***, 480 U.S. 321, 326-27 (1987).

¶9 The State contends that the marijuana was in plain view. Therefore, the State argues, Fourth Amendment concerns are not even implicated because no search occurred. The trial court did not conclude that the evidence was in plain view. We agree that the incriminating character of the evidence was not immediately apparent, and that the marijuana was not in plain view. We therefore conclude that a search occurred when Vacha obtained the baggie of marijuana.

¶10 Rice argues that he did not consent to the search, therefore Vacha needed a warrant. Searches made without a warrant "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967). A warrantless search pursuant to valid consent is constitutionally permissible. *See* ***id.*** at 358 n.22. When the state asserts consent, it has the burden of proving the consent was voluntary by clear and convincing evidence. *See* ***State v. Rodgers***, 119 Wis. 2d 102, 107, 114-15, 349 N.W.2d 453 (1984).

¶11 Consent must be voluntary under the totality of circumstances, and not the product of duress or coercion, express or implied. *See* ***Rodgers***, 119 Wis. 2d at 111. In determining whether consent was voluntary, we consider both the circumstances surrounding the consent and the characteristics of the defendant. *See* ***State v. Phillips***, 218 Wis. 2d 180, 198, 577 N.W.2d 794 (1998). Voluntariness of consent is a mixed issue of fact and law. *See* ***State v. Bermudez***, 221 Wis. 2d 338, 345, 585 N.W.2d 628 (Ct. App. 1998). We will not overturn the trial court's findings of historical or evidentiary fact unless clearly erroneous. *See* ***id.*** However, we give no deference to the trial court in our determination of

whether the constitutional standard for voluntariness has been met. *See* ***id.*** at 345-46.

¶12 The trial court found that Vacha requested that Rice give him the baggie, and that Rice had the choice of not pulling the baggie out of his pocket. Vacha testified that he requested that Rice produce the baggie, and that, had Rice chosen not to give him the baggie, he did not know what he would have done. When witness testimony conflicts, the trial court is the ultimate arbiter of the credibility of witnesses. *See* ***State v. Angiolo***, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994). We review determinations of credibility with deference. *See* ***Estate of Huehne***, 175 Wis. 2d 33, 43, 498 N.W.2d 870 (Ct. App. 1993). Upon the evidence in the record, the trial court's findings of fact and its acceptance of Vacha's version of events are not clearly erroneous.

¶13 Among the surrounding circumstances we consider are: the officer's use of any deception in enticing the defendant to give consent, *see* ***Rodgers***, 119 Wis. 2d at 108-09; the use of threats, physical intimidation, or punishment against the defendant, *see* ***Phillips***, 218 Wis. 2d at 199; the presence of multiple officers when consent is given, *see* ***State v. Stankus***, 220 Wis. 2d 232, 240, 582 N.W.2d 468 (Ct. App. 1998); whether the officer's weapon was drawn, *see* ***Phillips***; 218 Wis. 2d 199-200; whether the questioning took place in generally non-threatening, cooperative conditions, *see* ***id.*** at 200; the defendant's response to the officer's request, *see* ***Bermudez***, 221 Wis. 2d at 349; the length of police contact, *see* ***State v. Xiong***, 178 Wis. 2d 525, 535, 504 N.W.2d 428 (Ct. App. 1993); and whether the officer informed the defendant that consent could be withheld, *see* ***Phillips***, 218 Wis. 2d at 203.

¶14 Vacha did not use any misrepresentation, deception, or trickery to entice Rice's consent, nor did he threaten, physically intimidate, or punish Rice. He was the only officer present, and he did not have his weapon drawn. The questioning and detention were brief and took place during a generally non-threatening traffic stop. Though Rice was evasive with his answers, his conduct was not uncooperative. Nothing in the record indicates that Vacha informed Rice that his consent could be withheld, but this is not fatal to a voluntariness determination. *See* ***Phillips***, 218 Wis. 2d at 203.

¶15 Personal characteristics of the defendant which we consider in determining voluntariness include: the defendant's age, education and intelligence, physical and emotional condition, prior contact with police, cultural background, and understanding of the language used by the questioning officer. *See* ***Xiong***, 178 Wis. 2d at 535-36.

¶16 Rice was in his early thirties and had completed schooling up to the twelfth grade. There is nothing in the record that reflects any mental or psychological defect. There is also nothing in the record indicating any emotional or physical condition that would bear on the voluntariness of his consent. Rice's degree of prior contact with police is not clear from the record. It is clear from the record that Rice speaks the English language, which was the language Vacha used when questioning him, and that Rice's cultural background was not at issue.

¶17 Rice contends that he felt coerced because he believed Vacha commanded him to produce the baggie. But, an officer has the right to ask for consent. *See* ***Stankus***, 220 Wis. 2d at 239. An individual has the right to say no, but only when the right to say no is compromised by an official show of authority is consent coerced. *See* ***id.*** Vacha did not make an official show of authority. The

trial court found that he requested, not commanded, production of the baggie, and this finding was not clearly erroneous.

¶18 Under all the facts and circumstances, we conclude that Rice was not coerced into handing the baggie to Vacha. Based on our conclusion that Rice's consent to produce the baggie was voluntary, we further conclude that the trial court correctly denied Rice's motion to suppress the baggie.

¶19 Rice next contends that the trial court did not have jurisdiction over him. Rice asks us to overrule ***State v. Smith***, 131 Wis. 2d 220, 224, 388 N.W.2d 601 (1986), in which the supreme court held that an unlawful arrest does not deprive the court of personal jurisdiction over a defendant. Rice instead asks that we re-adopt the holding of ***State v. Monje***, 109 Wis. 2d 138, 145, 325 N.W.2d 695 (1982), that a court may be deprived of personal jurisdiction over a defendant when there is an unlawful arrest.

¶20 We have concluded that when Vacha obtained the baggie of marijuana, he was engaging in a lawful search. Therefore, Vacha's arrest of Rice was lawful, and the court had jurisdiction over him regardless of ***Smith***. However, we note that even if Rice's arrest were unlawful, we would be bound to follow ***Smith***. The state supreme court is the only state court that can "overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.