

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 2006

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. 2005AP2789-CR

Cir. Ct. No. 2004CF428

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SETH A. FOSTER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Outagamie County:
DENNIS C. LUEBKE, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals two orders suppressing evidence seized from Seth Foster's home. The trial court concluded that the warrantless search of Foster's home was a police search and not a probation search, and, therefore required a warrant based on probable cause rather than just the

reasonable grounds required for a probation search. Because we conclude the trial court erred in its determination of constitutional fact, we reverse the orders suppressing the evidence and remand the matter for further proceedings.

¶2 Whether a search is a police search or a probation search is a question of constitutional fact that we decide without deference to the trial court. *See State v. Hajicek*, 2001 WI 3, ¶26, 240 Wis. 2d 349, 620 N.W.2d 781; *State v. Woods*, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984). Factors that determine whether a search is a police search or a probation search include whether police or probation agents instigated the search, whether law enforcement was present for protection purposes, and whether the probation agent conducted the search of the residence. *See State v. Wheat*, 2002 WI App 153, ¶¶19-23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶3 Only two witnesses testified at the suppression hearing, probation supervisor Todd Lowe and investigator Cory Krueger, a member of the Lake Winnebago MEG unit, (Metropolitan Enforcement Group), a drug investigation unit. Lowe testified that he received information that drugs were being sold out of the house where probationer Foster, and Chad Willems, lived. Lowe called Krueger to confirm some information and invited Krueger to accompany him for protection purposes in a “home visit” to Foster’s residence. When Lowe, Krueger and another probation agent arrived, they were shown to Willems’s room by roommate Ryan Engelhardt. There, they observed drug paraphernalia and Lowe commenced a search of the residence. Willems informed Lowe that Foster had left the premises and that Foster kept his drugs in a green and black backpack.

¶4 While Lowe questioned Willems, Engelhardt proceeded to his room. Krueger followed Engelhardt and observed him with a marijuana plant. Krueger

then placed Engelhardt in custody and called the sheriff's department for backup. Krueger then made a protective sweep of the residence and, after finishing the sweep, watched Willems and Engelhardt while Lowe searched the residence. When other officers arrived, including additional MEG officers, Krueger searched Engelhardt's room. One of the MEG officers pointed out a green and black backpack in the hallway. Lowe seized the backpack and searched it, finding cocaine, marijuana, and money.

¶5 The search of Foster's residence and backpack was a probation search. Agent Lowe decided to conduct the search. Except for Krueger's arrest of Engelhardt and search of his room, the search was not conducted by police and the police did not direct the probation agents' search. Lowe and Krueger both testified that Krueger was at Foster's residence for protection purposes only. Agent Lowe, not the police, opened and searched Foster's backpack.

¶6 The trial court focused on three facts when it determined that the search of Foster's home was a police search. First, the court noted that Lowe contacted the MEG unit instead of local law enforcement.¹ We attach no significance to that choice. Lowe called Krueger to verify information and invited him to accompany Lowe on the home inspection to protect Lowe. Inviting a drug unit officer for protection does not transform the probation agent's search into a police search. *See Hajicek*, 240 Wis. 2d 349, ¶33.

¹ The trial court misstated some facts regarding the initial phone contact and the request for additional officers. The uncontradicted testimony established that Krueger did not initiate the search. When Krueger called for backup after he arrested Engelhardt, he called the local sheriff's department, not the MEG unit. Other MEG officers called Krueger during the search and decided to go to the residence. The additional MEG officers did not search the premises, but one of them pointed out the backpack to the probation officer who conducted the search.

¶7 Second, the trial court was concerned about Krueger's search of Engelhardt's room. That search does not affect Lowe's search for evidence against Foster. The evidence uncovered in Engelhardt's room is not the evidence that Foster seeks to suppress. Krueger did not participate in the search of Foster's backpack. While there may have been a police search of Engelhardt's room incident to his arrest, that search does not change Lowe's search for evidence involving Foster into a police search.

¶8 Third, the trial court noted that the backpack that contained the contraband was first seen by an MEG officer. The officer only pointed at the backpack. Probation agents conducted the search. The fact that an officer pointed at the backpack did not transform the probation search into a police search. *Wheat*, 2002 WI App 153, at ¶19.

By the Court.—Orders reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

