COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 00-1361-CR
00-2050-CR

Cir. Ct. Nos. 00-CF-87
00-CF-86

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 00-1361-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

PERCELL L. PARKER,

DEFENDANT-RESPONDENT.

NO. 00-2050-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CORDELL A. BUFFORD,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 LUNDSTEN, J. The State of Wisconsin appeals orders of the circuit court granting defendants Percell Parker's and Cordell Bufford's motions to suppress evidence. For the following reasons, we affirm.

I. Background

¶2 Percell Parker and Cordell Bufford were charged with various drug offenses after police obtained cocaine and marijuana discovered in their motel room at the Lake Motel in the city of Onalaska. The parties do not dispute that a bag of cocaine was discovered by the motel owner, Verna Stefanski, when she was cleaning Parker and Bufford's room, and that she summoned the police to the motel. The parties do, however, dispute how and where the police obtained the cocaine.

¶3 Parker moved to suppress the evidence and, after a suppression hearing, the circuit court granted that motion. Subsequently, Bufford orally moved to suppress, and the court orally extended the suppression ruling to Bufford. The State appealed, and this court remanded for specific factual findings on the following three questions: (1) what did the police officers say or do, if anything, indicating what Stefanski should do with the plastic bag; (2) at what place and time did Stefanski actually hand over the plastic bag to a police officer; and (3) what information did the police, including the 911 operator, have prior to the time the officers entered the motel room.

¶4 On remand, the circuit court made the following findings of fact:

> 1. On Saturday afternoon February 12, 2000 Onalaska police stopped into the motel to ask Mrs. Stefanski about the occupants of Room #4.
>
> 2. On Sunday, February 13, 2000 Mrs. Stefanski sees the occupants of Room #4 leave the premises and goes into the room to clean it. During her cleaning she hears the toilet running and finds the bag containing what she suspects to be cocaine based upon what she has seen on television.
>
> 3. She calls 911 and reports finding a substance which she believes to be cocaine and requests the assistance of officers. She is asked to repeat the information several times to the 911 operator so there could be no question as to her information.
>
> 4. She places the bag with the substance on the bed and exits the room to shovel the walk while waiting for the police officers to arrive.
>
> 5. Approximately 10 minutes later police officers arrive, she sees them and as they are walking to the room she is indicating to them what she has found.
>
> 6. As they walked to Room #4 the officers were aware of the fact that they did not have a search warrant to enter the room and requested that Mrs. Stefanski bring the bag containing the substance suspected to be cocaine to them. She went into the room, picked up the cocaine from the bed and brought it to the threshold of the door.
>
> 7. At the threshold of the door the officers asked her where she found the bag. Stefanski went to the bathroom followed by Officer Johnson and Officer Danou; Officer Danou did not go into the bathroom as there was not enough room for three people but he was in the room. She took the back off the toilet tank and showed Officer Johnson where she had found the bag.
>
> 8. The officers were told by Mrs. Stefanski prior to getting to the threshold of Room #4 that she believed what she found in the bathroom was cocaine.
>
> 9. Prior to arriving at the scene the officers had been told by dispatch that a suspicious material had been

> found at the motel. They knew upon arriving at the premises that they did not have a search warrant to enter the room and they requested that Mrs. Stefanski bring the bag to them.[1]
>
> 10. Upon seeing where [Mrs.] Stefanski found the bag the officers left the room to use their car radio. During this time the bag with the suspected cocaine remained on the bed in the room.
>
> 11. Officer Johnson returned to the squad car, Officer Danou stayed between the open door and the squad car. After talking on the car radio, Officer Johnson and Officer Danou returned to the room. Officer Johnson had put on gloves. Mrs. Stefanski lifted the bag from the bed and handed the bag to Officer Johnson while they were both inside motel Room #4.
>
> 12. The interview that was done with Mrs. Stefanski on February 18, 2000 is specifically discounted by this court based upon the leading nature of the questions asked of Mrs. Stefanski during the interview, it was conducted for the purpose of correcting the perceived errors which came to light at the preliminary hearing.
>
> 13. The contradictory testimony of the officers is resolved by accepting the testimony at the preliminary hearing which was given closest in time to the events as they occurred without the benefit of Monday morning quarterbacking.

II. Discussion

A. Whether the Circuit Court's Findings of Fact are Clearly Erroneous

¶5 On appeal, the State asserts that findings 5, 6, 8, 9, 12 and 13 are unsupported by the evidence. The State asserts that findings 12 and 13 contradict findings initially made by the trial court after the suppression hearing. We disagree.

[1] Because the circuit court did not find that Stefanski handed the bag to the officers at this time, we assume Stefanski did not do so.

¶6 We will not set aside the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). In keeping with our normal practice, we will assume facts, reasonably inferable from the record, in a manner that supports the trial court's findings and decision. *See, e.g.*, ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984); *see also* ***State v. Hockings***, 86 Wis. 2d 709, 722, 273 N.W.2d 339 (1979). The circuit court's findings in this case will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

Findings 5 and 8

¶7 The circuit court's finding 5 is as follows: "Approximately 10 minutes later police officers arrive, [Mrs. Stefanski] sees them and as they are walking to the room she is indicating to them what she has found." The court's finding 8 similarly states: "The officers were told by Mrs. Stefanski prior to getting to the threshold of Room #4 that she believed what she found in the bathroom was cocaine."

¶8 Findings 5 and 8 are supported by the evidence in the record and, accordingly, are not clearly erroneous. At the preliminary hearing, Officer Kevin Johnson testified that as the officers arrived at the motel, Stefanski was outside and she stated she found something she believed to be cocaine.

Finding 6

¶9 The circuit court's finding 6 states: "As they walked to Room #4 the officers were aware of the fact that they did not have a search warrant to enter the

room and requested that Mrs. Stefanski bring the bag containing the substance suspected to be cocaine to them. She went into the room, picked up the cocaine from the bed and brought it to the threshold of the door." Because the officers' subjective awareness is irrelevant, see ***State v. Kiekhefer***, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997), we consider only the circuit court's finding that the officers requested Stefanski to bring the cocaine to them and that she did so.

¶10 At the preliminary hearing, Officer Johnson testified that when he asked Stefanski to show him what she found, she went into Room #4, picked up the cocaine from the bed, and brought it to him. On re-cross-examination, the following colloquy took place:

> Q You knew that she had found some material; correct?
>
> A Correct.
>
> Q Before getting there?
>
> A Right.
>
> Q And when you got there, she told you it was in the room; right?
>
> A Right – well, I didn't know exactly which room it was at that point in time.
>
> Q Well, I thought you testified when Mr. Huh asked you the questions that you could see where she went and got it from?
>
> A Yes. Afterwards, right.
>
> Q All right. So she told you it was in the room; right?
>
> A Yes.
>
> Q And you didn't want to go in the room because you didn't have a search warrant; correct?
>
> A Correct.

Q So you asked her to go get it for you; right?

A Yes, I guess I did.

¶11 While Officer Danou and Officer Johnson both testified later at the suppression hearing that Stefanski opened the door to Room #4, retrieved the cocaine on her own initiative, and brought it to them, the trial court was free to believe Officer Johnson's initial testimony at the preliminary hearing. *See* ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990) (it is for the fact finder, not the appellate court, to resolve conflicts in the testimony).

Finding 9

¶12 The circuit court's finding 9 is as follows: "Prior to arriving at the scene the officers had been told by dispatch that a suspicious material had been found at the motel. They knew upon arriving at the premises that they did not have a search warrant to enter the room and they requested that Mrs. Stefanski bring the bag to them."

¶13 We have already concluded above that the record supports a finding that the officers directed Stefanski to bring the cocaine to them. Presumably the State does not contest that part of finding 9 which states the officers had been told by dispatch that a suspicious material had been found. In any event, finding 9 is supported by the record. At the suppression hearing, both Officer Danou and

Officer Johnson testified that they were informed by dispatch that someone from the motel reported finding a suspicious item.[2]

Findings 12 and 13

¶14 The circuit court's finding 12 is as follows: "The interview that was done with Mrs. Stefanski on February 18, 2000 is specifically discounted by this court based upon the leading nature of the questions asked of Mrs. Stefanski during the interview, it was conducted for the purpose of correcting the perceived errors which came to light at the preliminary hearing." Finding 13 states: "The contradictory testimony of the officers is resolved by accepting the testimony at the preliminary hearing which was given closest in time to the events as they occurred without the benefit of Monday morning quarterbacking."

¶15 With respect to finding 12, and as noted above, Officer Johnson indicated at the preliminary hearing that he told Stefanski to go get the bag of cocaine from Room #4 for him. Two days later, Stefanski was interviewed by police and a transcript of that interview was introduced at the suppression hearing. During the interview, Stefanski was asked and answered the following questions:

> [Q] So at that point the officers were still outside the room, had not entered the room and had not asked you to go in and retrieve the bag. Is that accurate?
>
> [A] To the best of my knowledge, that's absolutely true.

[2] Indeed, while the State's supplemental brief generally challenges several of the circuit court's factual findings, the supplemental brief provides precious little explanation or factual analysis of the record. The State's argument is essentially limited to asserting that some of the circuit court's factual findings are inconsistent with a single statement the court made at the suppression hearing in the course of suppressing the evidence. That topic is addressed in ¶¶ 17 to 19 of this decision.

> [Q] Did they ever ask you to act as an agent of the police and go into the room and retrieve the bag?
>
> [A] Never.

¶16 These answers by Stefanski are contradictory to the testimony of Officer Johnson at the preliminary hearing. As we have already stated in this opinion, it is for the circuit court and not this court to resolve conflicts in testimony. *See* ***Fuller***, 159 Wis. 2d at 332. We cannot say that the circuit court's inference, that Officer Johnson's testimony at the preliminary hearing was more accurate than Stefanski's testimony at the police interview conducted two days later, was clearly erroneous. Moreover, it is certainly not unreasonable for the court to believe, as described in finding 13, that the testimony given closest in time to the actual events was the more accurate testimony.

The State's Assertion that the Circuit Court is Inconsistent

¶17 The State contends in its supplemental brief filed after remand that the new factual findings and inferences made by the circuit court are contrary to the court's initial findings made at the suppression hearing. The State points to the following statement made by the court: "[A]lthough I do believe [Mrs.] Stefanski that she brought the stuff out, they had no business then going in there and I don't think they were following the constitutional rights of the defendants in this particular case."

¶18 We observe that this statement by the court does not address whether Stefanski "brought the stuff out" with direction from the police. Also, the State neglects to point out that the court made the following statement at the same time: "[W]e heard Mr. [sic] Officer Johnson's testimony about saying yeah, yeah, I got it and I told her to go in and get it. This is – this is bad police work, very bad

police work. But the fact of the matter is that's how your officer testified on the stand." This latter statement strongly suggests that even at the time of the suppression hearing, the circuit court believed as a factual matter that the officer had directed Stefanski to "go in and get [the cocaine]."

¶19 Furthermore, we remanded this case precisely because we could not ascertain from the record whether the circuit court believed certain statements by Officer Johnson that he directed Stefanski to retrieve the cocaine from Room #4, or whether the court believed later statements by Officer Johnson and Officer Danou that Stefanski retrieved the cocaine on her own initiative. The circuit court has now specifically addressed our questions, and the State has cast no doubt whatsoever on the court's clarification.

B. Whether the Circuit Court Erred in Suppressing the Cocaine

¶20 Having concluded that the circuit court's findings of fact following remand are not clearly erroneous, we turn now to the arguments the State made prior to remand. Prior to remand, the State asserted that the cocaine should not have been suppressed because: (1) Stefanski was not acting as a government agent when she gave the cocaine to the officers; (2) the cocaine was in plain view; (3) the police reasonably would have believed that Stefanski had authority to consent to a search of the room; and (4) the cocaine would have inevitably been discovered. We address each argument in turn.

Government Agent

¶21 The State first contends that Stefanski was not acting under the direction of law enforcement when she tendered the evidence to the police. This argument is unavailing. If we were to infer that Stefanski handed the cocaine to

the police while the police were still outside the motel room, she would have done so at the request of Officer Johnson. When the officers encouraged Stefanski to show them what she had found, she was acting as a government agent and her actions were covered by the Fourth Amendment. *See* ***State v. Rogers***, 148 Wis. 2d 243, 246, 435 N.W.2d 275 (Ct. App. 1988).

¶22 In any event, the circuit court's findings of fact indicate that the officers obtained the cocaine while illegally inside the motel room. Apart from the arguments addressed below, the State does not explain why the officers could legally obtain the cocaine while illegally inside the room.

Plain View

¶23 The State's plain view argument assumes Stefanski entered Room #4 and brought out the bag of cocaine of her own accord. However, this factual assumption is not supported by the circuit court's findings of fact. Moreover, even if we assumed Stefanski opened the motel room door of her own accord, allowing the officers a glimpse of the cocaine on the bed, the State does not explain why seizure of the cocaine after the warrantless illegal entry into the room did not violate the Fourth Amendment.

Consent to Search

¶24 The State also argues that the officers would have reasonably believed that Stefanski, as the motel owner, had authority to consent to their entry. We note that the State points to no place in the record where there is evidence that Stefanski invited the officers to enter the room. Furthermore, the United States Supreme Court has refused to permit an otherwise unlawful police search of a hotel room to rest upon the consent of a hotel employee or proprietor. *See*, *e.g.*,

Stoner v. California, 376 U.S. 483, 488-89 (1964); ***Lustig v. United States***, 338 U.S. 74, 78-79 (1949).

Inevitable Discovery

¶25 Finally, the State asserts that even if the seizure of the cocaine was tainted by some illegal act, the cocaine is nonetheless admissible under the doctrine of inevitable discovery. Under this doctrine, otherwise excludable fruits of an illegal search may be admitted into evidence if the tainted fruits would have been inevitably discovered by other lawful means. *See* ***Nix v. Williams***, 467 U.S. 431, 444 (1984). In the context of search and seizure law, "inevitable discovery" has a specific meaning. It does not apply whenever it is obvious that the police could have and would have legally obtained evidence if they had not first obtained it illegally. Rather, the State must establish: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search, the government was also actively pursuing some alternate line of investigation. ***State v. Lopez***, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996).

¶26 The State asserts that the third prong of this test is satisfied because "there is nothing to indicate that a search warrant would not have been applied for and obtained by the police officers [if the officers had not instead obtained the evidence illegally]." However, this assertion does not show that the police were "actively pursuing some alternate line of investigation" which would have led to the legal seizure of the evidence.

¶27 The State cites ***United States v. Buchanan***, 773 F. Supp. 1207 (W.D. Wis. 1989), to support its argument that the cocaine is admissible under the inevitable discovery doctrine. The ***Buchanan*** court did not, however, utilize the three-prong test that we are required to apply under our prior decision in ***Lopez***.

¶28 For all of the reasons expressed above, we affirm the circuit court's orders suppressing the evidence.

By the Court.—Orders affirmed.

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