**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 6, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP1177-CR** **Cir. Ct. No. 2005CF1633**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TYRONE M. WESLEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 FINE, J. Tyrone M. Wesley appeals a judgment entered after a jury found him guilty of armed robbery with the threat of force, *see* WIS. STAT. § 943.32(2); attempted armed robbery with the threat of force, *see* WIS. STAT. §§ 943.32(2), 939.32; and being a felon in possession of a firearm, as an habitual

criminal, *see* WIS. STAT. §§ 941.29(2)(a), 939.62. Wesley claims that the trial court erred when it denied his motion to suppress. We affirm.

I.

¶2 The police found a gun during a protective sweep of an apartment rented by Wesley's stepfather, Frank James.[1] Wesley sought to suppress the gun because, he contended, the police did not have consent to enter the apartment.

¶3 At a hearing on the motion, Officer Steven Strasser testified that the police were looking for Wesley because he was wanted on an outstanding felony warrant for possessing a firearm as a felon. The officers knocked on the apartment door and James answered. According to Strasser, the police asked James if they could come in and talk to "someone that was supposedly staying there, wanted on a felony warrant." James said "yes" and stepped back so the officers could come in. Strasser told the court that "from the door" of the apartment he saw two men in the living room, one of whom he recognized as Wesley: "Tyrone [Wesley] was on the floor in plain view before I even entered the apartment." According to Strasser, he "maintain[ed] custody" of Wesley while several officers did a protective sweep. During the protective sweep, an officer opened a closet door and saw a gun in plain view.

¶4 Detective Ralph Spano testified that he and several officers went to the apartment to investigate a robbery and arrest Wesley on an outstanding felony

[1] A protective sweep is "a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others." ***State v. Blanco***, 2000 WI App 119, ¶¶23, 25, 28, 237 Wis. 2d 395, 410–412, 614 N.W.2d 512, 520–521 (internal quotation marks and brackets omitted) (upholding protective sweep of crawlspace above a bathtub).

warrant for possessing a firearm as a felon. According to Spano, after James let them in, he explained to James that the police were there to investigate a robbery and the officers were going to do a protective sweep of the apartment to make sure that "no other suspects [were] there." Spano told the court that "several minutes" after the officers went in, James told him that the police could search the apartment. The police searched the apartment and found property belonging to one of the robbery victims and a jacket matching a victim's description of what the robber was wearing.

¶5 Sergeant Mario Gutierrez testified that, as the officers were walking into the apartment, Wesley lifted up his head and looked directly at them. According to Gutierrez, the officers recognized Wesley as the person wanted for possessing a firearm as a felon. Several officers then did what Gutierrez described as a "very quick protective sweep" in a "very small apartment." Gutierrez told the court that while the officers were doing the protective sweep, he tried to handcuff Wesley and told Wesley that he was under arrest. According to Gutierrez, Wesley initially gave a false name, but admitted who he was when the police showed Wesley a photograph of himself. Gutierrez testified that this happened while Wesley was "in the middle of the living room": "[Wesley] was right in the middle of the living room as soon as you open the door. He was right, maybe from me to this second chair away, you know, what -- 10 feet." Gutierrez told the court that once the officers found the gun, they stopped what they were doing until Spano "arrived on the scene."

¶6 James testified that, when he answered the door, the police told him that they were there to investigate a call that "somebody was in [the apartment] whopping a girl," and they were not going to leave until they had checked. James told them that there was no woman in the apartment and let the police in to check.

According to James, the police drew their guns and looked in a living room closet that was "right there just as you come in." One of the officers said there was a gun in the closet and then closed the closet door. James told the court that, after the officer found the gun, the police "c[a]me back with a search warrant," and he told the police that they could search the apartment because he did not think there was a gun in the closet.

¶7 Based on this testimony, the trial court found, as material, that:

- the officers went to the apartment to "arrest someone";
- Wesley's stepfather gave the officers consent to enter the apartment;
- the officers entered the apartment and "made an immediate protective sweep";
- the officers did not "identify, did not arrest [Wesley] immediately";[2]
- an officer testified that he saw Wesley from the hallway, while the sergeant testified that, as he was coming in, Wesley looked up;
- the officers questioned Wesley and he misrepresented who he was; and
- the officers found a gun and "froze the situation" until the detective "came in."

[2] The trial court's finding that the officers did not "identify" Wesley "immediately" seems to refer to the delay in getting Wesley to admit who he was because the trial court also apparently found that Strasser testified truthfully when he indicated that he saw and recognized Wesley through the open door.

The trial court then granted Wesley's motion to suppress the gun, concluding that the police did not have consent to conduct the protective sweep: "[T]he Court is going to find that there was not consent to engage in that protective sweep. There was not a consent to search, and that under those circumstances, the Court's going to grant [Wesley's] motion." Neither party challenges this ruling on appeal.

¶8 Wesley then sought to suppress the property and jacket found during the search, arguing under ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), that his stepfather's consent to search was tainted by the allegedly illegal protective sweep. *See* ***id.***, 218 Wis. 2d at 205, 577 N.W.2d at 805 (three factors to determine whether the taint of earlier illegal police activity has been attenuated by the time consent to search is granted are: "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct").

¶9 The trial court denied Wesley's motion, concluding that Wesley's stepfather consented to the search: "[T]he court will find that the State has proven that there was consent for that subsequent search, and that the initial discovery by what was described as the protective sweep did not taint that consent in any manner." The trial court determined that a ***Phillips*** analysis was not necessary because Wesley's stepfather consented to the entry and search of the apartment:

> In this particular circumstance, [Wesley's stepfather] opened the door and let them come in. He was talking to the Detective regarding the consent -- subsequent consent when some of the officers fanned out for the protective sweep. There is no indication that he felt in any way coerced by that. And he was very clear and direct in his statement that he was happy to have them come in. He was happy to have them do the search; that he was sure that they weren't going to find anything. So I don't think the specific Phillips analysis is necessary under the circumstances.

(Underlining in original.) Wesley's only claim on this appeal is that the trial court erred because it did not conduct a ***Phillips*** analysis.

II.

¶10 The relevant facts here are not in dispute, and, accordingly, our review is *de novo*. *See* ***State v. Malone***, 2004 WI 108, ¶14, 274 Wis. 2d 540, 550, 683 N.W.2d 1, 6. As we have seen, the trial court concluded that the protective sweep was illegal. Even though the State does not challenge this ruling on appeal, we are not bound by the State's concession. *See* ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626, 629 (1987). The trial court was wrong because once the police were lawfully in the apartment pursuant to the stepfather's consent and saw Wesley in plain sight, they were fully justified in searching the closet to ensure that it was not an area from which an accomplice could attack. *See* ***State v. Blanco***, 2000 WI App 119, ¶23, 237 Wis. 2d 395, 410, 614 N.W.2d 512, 520 ("[D]uring an arrest, officers may without probable cause or reasonable suspicion look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.") (quoted source, internal quotation marks, and brackets omitted). And thus, contrary to the Dissent's flawed assumption, there was *no* "illegality" to vitiate James's subsequent consent to search, and, accordingly, we need not reach the ***Phillips*** issue because the gun in the closet was found during a valid search incident to arrest. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) ("It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed."); *see also* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶11 Further, a search incident to arrest is an exception to the general rule against warrantless searches; it allows officers to detect and remove any weapons that the arrestee might try to use to resist arrest or escape, or to prevent the destruction or concealment of evidence. *See* ***Chimel v. California***, 395 U.S. 752, 762–763 (1969); ***State v. Murdock***, 155 Wis. 2d 217, 227–228, 455 N.W.2d 618, 622 (1990). During a search incident to arrest, the police may reasonably search the area within the arrestee's immediate control, that is, the "'area from within which [the arrestee] might gain possession of a weapon or destructible evidence.'" ***Murdock***, 155 Wis. 2d at 229, 455 N.W.2d at 623 (quoted source omitted). "Whether a particular place is an area from which a defendant might secure a weapon is a question of constitutional fact which an appellate court will review independently of the trial court's findings." ***Id.***, 155 Wis. 2d at 226, 455 N.W.2d at 621.

¶12 In this case, the undisputed testimony at the hearing on Wesley's motion to suppress established that: (1) Wesley was arrested "in the middle of the living room" about ten feet from the apartment's door; (2) the police found the gun in a living room closet near the apartment door; and (3) the search of the closet and Wesley's arrest happened in a "very small apartment." Under these circumstances, the closet was within Wesley's immediate control as that concept is explicated in ***Murdock***. Moreover, the police could reasonably suspect that Wesley, a convicted felon wanted for illegally possessing a firearm, might have a gun. Thus, it was reasonable for the police to check the living room closet for weapons. *See, e.g.*, ***id.***, 155 Wis. 2d at 222–223, 237, 455 N.W.2d at 620, 627 (search of "pantry-type closet" three to four feet from defendant reasonable search incident to arrest). Although the trial court found that Wesley was not "immediately … arrest[ed]," the search of the closet was sufficiently

contemporaneous to Wesley's arrest to be a valid search incident to arrest. *See* ***State v. Sykes***, 2005 WI 48, ¶15, 279 Wis. 2d 742, 752, 695 N.W.2d 277, 282–283 (A "'search may be incident to a subsequent arrest if the officers have probable cause to arrest before the search.'") (quoted source omitted). In sum: (1) Wesley's stepfather voluntarily let the officers into his apartment; (2) the police recognized Wesley immediately before or on entering the apartment, and could thus lawfully arrest him; and (3) the gun was found in the nearby closet pursuant to a valid search incident to Wesley's arrest. Again, contrary to the Dissent's supposition, there was no "illegality" to taint Wesley's stepfather's subsequent consent to search and there was thus no need for the trial court to perform a ***Phillips*** analysis.

*By the Court.*—Judgment affirmed.

Publication in the official reports is not recommended.

¶13 KESSLER, J. (*dissenting*). I agree with the trial court that the "protective sweep" of an entire apartment, which included opening closet doors which were clearly beyond the reach of the defendant, was improper.[1] Because the protective sweep was improper, the trial court was required to make factual findings from which a ***Phillips***[2] analysis can be done when, as here, what the trial court found to be illegal police conduct (a search made without consent described as a "protective sweep"), the defendant asserts tainted a subsequent consent to search the apartment.[3]

¶14 As the majority notes, Majority, ¶8, ***Phillips*** requires a three-step analysis to determine whether, at the time of the challenged consent, the taint of the initial illegal police conduct has been so attenuated that the challenged consent is not the result of that prior conduct. To make that determination, as the Majority notes, ***id.***, the trial court is to consider the temporal proximity of the official misconduct to the seizure of evidence, the presence and effect of any intervening circumstances, and the purpose and flagrancy (if any) of the official misconduct. *See* ***Phillips*** at 205. That analysis, and the factual finding necessary to that analysis, was not done here.

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[1] *See* Majority, ¶7.

[2] ***State v. Phillips***, 218 Wis. 2d 180, ¶¶15-18, 577 N.W.2d 798 (1998).

[3] *See* Majority, ¶¶8-9.

¶15 The trial court concluded that a ***Phillips*** analysis was unnecessary because the person leasing the apartment consented to the search that discovered the evidence sought to be suppressed. *See* Majority, ¶9. However, such a conclusion begs the question because it is precisely that consent, given after the "protective sweep" search, which the trial court found was improper, as to which findings of fact and legal conclusions are required by ***Phillips***. Because such factual findings did not occur here, and because meaningful review by this court cannot be done when such underlying findings of historical fact are required but are absent,[4] I would remand this case to the trial court for a hearing and findings pursuant to ***Phillips***.

¶16 The majority attempts to avoid the lack of factual failings on this constitutional issue by concluding that consent for the "protective sweep" of the entire apartment was not needed because defendant was ten feet from the closet the police searched and the majority's hypothesis is that an "accomplice" might have been hiding in the closet meaning to do them harm. *See* Majority, ¶10. The majority points to no facts in the record suggesting such a notion.

¶17 The lack of necessary fact finding requires remand to the trial court. For that reason, I respectfully dissent.

[4] *See* ***Phillips***, ¶¶13-14. *See also* ***State v. Turner***, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987), cited in ***Phillips***, ***id.***, discussing the standard of review for challenged consent to a warrantless search of a home: "[W]e ... independently determine from the facts as found by the trial court whether any time-honored constitutional principles were offended. … This is true whether we are examining the voluntariness of defendant's consent to search or whether we are deciding if defendant's confession was voluntarily procured."