COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2511-CR **Cir. Ct. No. 2005CF458**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANTEL DENIECE MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Shantel Deniece Mitchell appeals from the judgment of conviction entered against her. She argues that the circuit court erred when it denied a motion to suppress evidence and a motion to suppress a statement

she gave to the police. Because we conclude that the circuit court did not err, we affirm.

¶2 Mitchell was charged with possession with intent to deliver 200 grams or less of marijuana. Mitchell filed a motion to suppress as evidence the marijuana that the police recovered when doing a protective sweep of a residence. The court held a hearing on the motion. A police officer testified at the hearing. The officer testified that he was on patrol when he received a call that there had been a shooting at a house. When he arrived at the house, there were people in the front room, and the scene was "pretty chaotic." He also saw a man lying on the ground who appeared to have been shot. The officer asked another officer on the scene if the house had been cleared and the answer was no. He then identified himself as a police officer and began looking throughout the house for another body or for the suspect. He testified that when he was in the kitchen, he checked the stove because, in other searches, he had found people hiding in stoves.

¶3 When the officer came back down the stairs, he noticed that there was a storage area in a wall. He described the storage area as being about two or three feet square, with some sort of covering. He remembers it being opened. He then climbed on a chair to look into the storage area to see if someone was hiding inside of it. When he looked in, he noticed a small blue safe. The storage area was roomy inside, and he climbed into it. When he pulled himself out, the safe snagged onto something and was pulled out with him. It tumbled down the stairs and fell open. Baggies of what he believed to be marijuana fell out of the safe. The officer testified that he did not intentionally open the safe.

¶4 The circuit court denied Mitchell's motion to suppress the evidence. The court found the officer to be credible. The court found that the officer went to

the house in response to a call about a shooting, and that it was not a drug investigation. The court further found that when the officer got there, he found a "dynamic situation" with lots of people and a man lying bleeding on the floor. When he learned that the house had not been cleared, "he knew that he had to do a protective sweep," because the shooter might still be in the house. The officer then went through the house looking for suspects and other victims, including looking in the stove and cupboards. He also checked in the storage area on the stairs. The court found that the storage area was "a natural place where a person could be hiding in this type of situation." When the officer was climbing out of the storage area, he knocked the small safe out, and it fell down the stairs.

¶5 The court concluded that this was a "protective sweep and community caretaker function type of situation," the officer acted reasonably, and the protective sweep of the entire house, including the storage area, was justified. The court denied Mitchell's motion.

¶6 Mitchell then moved to suppress a statement she made to the police. Mitchell alleged that, when she was questioned by the police, she asked for a lawyer after being read her ***Miranda***[1] rights, but she was not allowed one. She further argued that the statement she gave to the police was made under duress because her boyfriend had just been shot. At the hearing on the motion, Mitchell and an officer testified. The court determined the officer's testimony was credible and Mitchell's was not. The court found that, before the officer interviewed Mitchell, he read Mitchell her ***Miranda*** rights, she said she understood them, and she did not ask for a lawyer but agreed to answer questions without an attorney

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

present. The court further found that during the interview Mitchell was "calm and emotionally stable," even though her boyfriend had been shot. The court denied the motion. Mitchell then pleaded guilty to the charge. The court sentenced her to eight months in the House of Correction.

¶7 Mitchell argues on appeal that the protective sweep of the entire house was unreasonable and unlawful, and that any evidence found and her statement to the police should be suppressed because they were not sufficiently attenuated from the illegal search. She also argues that her statement to the police was taken in violation of her ***Miranda*** right to counsel and was not voluntary.

¶8 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Horngren***, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508. However, the application of constitutional principles to the facts as found by the circuit court presents a question of law, which we review de novo. ***Id.***

¶9 We first address the issue of the protective sweep.

> [A] law enforcement officer is justified in performing a warrantless protective sweep when the officer possesses "a reasonable belief based on specific and articuable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others."

State v. Sanders, 2008 WI 85, ¶32, 752 N.W.2d 713 (citation omitted). The officer must have only a "reasonable suspicion that the area poses a danger to the officers or others; the test is not probable cause." ***Id.*** A protective sweep may also be employed when officers are engaged in "community caretaking." *See* ***Horngren***, 2000 WI App 177, ¶¶9, 20. In this context, the sweep must be

reasonable under the totality of the circumstances. ***Id.***, ¶20. Community caretaking, however, must be totally separate from "'the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *See* ***State v. Anderson***, 142 Wis. 2d 162, 166-67, 417 N.W.2d 411 (Ct. App. 1987) (citation omitted).

¶10 In this case, the circuit court concluded that the protective sweep was performed as part of the police officer's community caretaking function. The appellant does not challenge this conclusion, but argues that the scope of the search was not reasonable. Consequently, we will address only the scope of the protective sweep.

¶11 "The protective sweep extends 'to a cursory inspection of those spaces where a person may be found' and may last 'no longer than is necessary to dispel the reasonable suspicion of danger ….'" ***Sanders***, 752 N.W.2d 713, ¶33 (citation omitted).

¶12 Mitchell argues that the officer did not act reasonably because there was no basis for believing the shooter was in the house or that the shooter was hiding in the storage area. Mitchell points out that the officer had been told that the shooter had fled from the scene. The officer testified, however, that people often do not know if there are other victims or if the shooter or shooters really have left. The storage area was of a size a person could hide in and in a place a person might reasonably choose to hide. We agree with the circuit court that, under these circumstances, it was reasonable for the officer to check the storage area in the stairway. Because we conclude that the search was reasonable, we do not need to address Mitchell's argument that the evidence obtained was not attenuated from the illegal search.

¶13 We next address Mitchell's statement to the police. The circuit court found that the officer read Mitchell her ***Miranda*** rights before interviewing her and that "[s]he did not ask for a lawyer, although he certainly gave her that right. And she agreed to answer questions without an attorney there." Mitchell argues that she did ask for a lawyer. However, the circuit court found the officer's testimony to be more credible. We have no basis for disturbing this finding.

¶14 Mitchell also argues that her statement was involuntary because she was brought to the police station at 2:00 a.m. in the morning, her boyfriend had been shot and had been taken to the hospital, the interview lasted about fifty-five minutes, and there is no indication that she was given any breaks or anything to eat or drink during this time.

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.
>
> The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation. Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness.
>
> We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers.
>
> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general

> conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

State v. Hoppe, 2003 WI 43, ¶¶36-39, 261 Wis. 2d 294, 661 N.W.2d 407 (citations omitted).

¶15 The circuit court found that the interview lasted about fifty minutes, and there were no promises, threats, or anything else of that nature. The court accepted the officer's testimony that Mitchell was emotionally calm and stable during the interview even though her boyfriend had been shot and the officer's testimony that he asked her if she wanted anything such as water, food, cigarettes and she requested nothing. We accept the circuit court's findings of fact because they are not clearly erroneous. Based on the facts as found by the circuit court, we conclude Mitchell's statement was made voluntarily.

¶16 Because the circuit court properly denied both motions to suppress, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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