COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3262-CR **Cir. Ct. No. 00-CF-132**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARRYL JOE BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Reserve Judge. *Reversed and cause remanded with directions.*

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

¶1 PETERSON, J. Darryl Joe Brown appeals a judgment convicting him of possession of marijuana with intent to deliver and keeping or maintaining a drug house, party to a crime, contrary to WIS. STAT. §§ 961.41(1m)(h)1 and 961.42(1). Brown argues that the circuit court erred by denying his motion to

suppress evidence because impounding his apartment was unlawful, thus rendering his roommate's consent to search the apartment involuntary. In order to lawfully impound the apartment, the police needed probable cause for a search warrant. Here, the court did not determine whether the police had probable cause. Furthermore, we conclude that the record is insufficient to make that determination. Therefore, we reverse and remand to the court for further proceedings consistent with this opinion.

BACKGROUND

¶2 On July 26, 2000, a confidential informant made a controlled buy of cocaine from Brown. The informant met Brown at his apartment where the transaction took place.

¶3 On August 30, 2000, at approximately 3 p.m., Brown was arrested for the cocaine transaction. Following the arrest, police undertook an investigation seeking to establish probable cause to issue of a warrant to search Brown's apartment. A police dog was brought to Brown's apartment building where it responded positively to drugs at the doorway of Brown's apartment.

¶4 At this point, several officers left to obtain a search warrant. The officers knew that Brown shared the apartment with Susan Tousignant so some officers remained at the scene to prevent her or anyone else from entering the apartment and destroying evidence before a search warrant could be issued.

¶5 At approximately 7:40 p.m., Tousignant arrived at the apartment building. Agent Mark Majcen approached Tousignant and explained that officers were securing the apartment while other officers were obtaining a search warrant. Majcen told Tousignant that although she was not under arrest and was free to

come and go, if she entered the apartment an officer would have to accompany her to prevent any destruction of evidence.

¶6 Tousignant told the officers to come in. She unlocked the door and entered the apartment. Tousignant, Majcen, and another officer sat at the kitchen table. Tousignant asked if Brown had been arrested and was told that he had been arrested for delivery of a controlled substance. She asked when the search warrant would arrive. Majcen replied that he did not know. Tousignant was again told that officers would have to accompany her from room to room if she decided to move around in the apartment. She responded that she might as well allow them to search.

¶7 Tousignant signed a written form consenting to the search of the apartment. The form was signed approximately fifteen minutes after she had arrived at the apartment. As a result of Tousignant's consent, the effort to secure a search warrant was abandoned. During the search, the officers found approximately three-quarters of a pound of marijuana in the refrigerator and a smaller amount in a bedroom.

¶8 A preliminary hearing was held on October 2, 2000, and Brown was bound over for trial. On November 6, 2000, Brown filed a motion to suppress evidence seized in the search. Brown argued that Tousignant's consent to search was not voluntary. Brown contended that officers lied to or misled Tousignant to consent to the search by stating that they were obtaining a search warrant and were going to have one shortly.

¶9 At a hearing on June 8, 2001, Majcen testified about the circumstances under which Tousignant consented to the search. Tousignant also testified and was generally consistent with Majcen's testimony. At the conclusion

of the hearing, the circuit court asked for briefs on two issues: (1) Brown's standing to challenge the consent given by Tousignant; and (2) whether the State has a right to impound an apartment to deny access to a co-occupant.

¶10 On June 27, 2000, the circuit court issued an oral decision. According to the court:

> I think the record is uncontroverted – testimony is uncontroverted at the motion hearing that the law enforcement was in the process of obtaining a warrant. So when the officers confronted Miss Tousignant and told her that, that was not a fabrication. There is nothing in the record to indicate that there – that it is a fabrication.
>
> And the testimony that the – they were in the process of obtaining a warrant was uncontroverted. She was told that she did not have to give consent, but if she didn't they were going to stay there until the warrant came. It was her choice. I think her consent was voluntarily given.
>
> ….
>
> So under the totality of the circumstances, I conclude that Miss Tousignant's consent was voluntarily given. So the motion is denied.

Brown subsequently pled no contest to the charges.

STANDARD OF REVIEW

¶11 A motion to suppress evidence raises a constitutional question, which presents a mixed question of fact and law. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). To the extent the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). The application of constitutional and statutory principles to the facts found by the court, however, presents a matter for

independent appellate review. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

DISCUSSION

¶12 Relying on ***Illinois v. McArthur***, 531 U.S. 326 (2001), Brown argues that the police did not have the authority to impound the apartment and, as a result, Tousignant was subject to an unlawful seizure at the time she consented, rendering her consent involuntary. He contends that police did not have authority to seize his apartment because: (1) the police did not have probable cause to obtain the search warrant despite telling Tousignant that one would be coming soon; (2) the police did not make reasonable efforts to reconcile their law enforcement needs with Tousignant's right to personal privacy; and (3) the seizure of the apartment lasted far longer than was necessary.

¶13 The Fourth Amendment states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Its "central requirement" is one of reasonableness. ***Texas v. Brown***, 460 U.S. 730, 739 (1983). The United States Supreme Court had interpreted the amendment as establishing rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy. In the ordinary case, seizures of personal property are unreasonable within the meaning of the Fourth Amendment, unless accomplished pursuant to a judicial warrant issued by a neutral magistrate after finding probable cause. ***United States v. Place***, 462 U.S. 696, 701 (1983).

¶14 There are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, or minimal intrusions, courts have found that certain circumstances may render a warrantless

search or seizure reasonable. ***Pennsylvania v. Labron***, 518 U.S. 938, 940-41 (1996).

¶15 In ***McArthur***, the Supreme Court held that police acted lawfully when they prevented McArthur from entering his home without police accompaniment while they were waiting for a search warrant. ***McArthur***, 531 U.S. at 331. The police had accompanied McArthur's wife to her home while she removed her belongings. When she exited the home, she told the police that McArthur, who was inside the home, had marijuana. When McArthur refused to give the police permission to search the residence, a second officer left to obtain a search warrant. The police then prevented McArthur, who by this time was on the front porch, from reentering the residence without accompaniment by one of the officers. While waiting for the search warrant, an officer accompanied McArthur into the home several times. ***Id.*** at 329.

¶16 The court concluded that the restriction police placed on McArthur was reasonable in light of the following four factors that "balance[d] the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." ***Id.*** at 331. First, based on their observations of McArthur and his wife, the police had probable cause to believe that the home "contained evidence of a crime …." ***Id.*** Second, the police had "good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant." ***Id.*** at 332. Third, the police did not search the home or arrest McArthur; instead they "imposed a significantly less restrictive restraint …." ***Id.*** Fourth, the seizure only lasted two hours, "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." ***Id.***

I. APPLICATION OF *MCARTHUR*

¶17 Here, both the State and Brown agree that the ***McArthur*** factors must be applied to determine whether the search was lawful. Brown concedes the second ***McArthur*** factor: It was reasonable for the police to fear that Tousignant would destroy any possible evidence of a crime before the police returned with a search warrant. *See* ***id.*** We turn to examining the other three factors.

A. Probable Cause

¶18 Brown points out that the circuit court never specifically made a finding that the police had probable cause to believe that the apartment contained evidence of a crime. He maintains that the evidence does not support a probable cause finding.

¶19 The test for the issuance of a search warrant is whether, considering the totality of the circumstances set forth in support of the warrant, probable cause exists to believe that objects linked to the commission of a crime are likely to be found in the place designated in the warrant. ***State v. Ehnert***, 160 Wis. 2d 464, 470, 466 N.W.2d 237 (Ct. App. 1991). It is the issuing judge's duty to make "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit … there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Higginbotham***, 162 Wis. 2d 978, 990, 471 N.W.2d 24 (1991) (citation omitted).

¶20 Brown first contends that using a police dog to sniff outside the door of a private apartment is itself a search. Because there was no probable cause to conduct that search, Brown concludes the search violated the Fourth Amendment.

¶21 The Supreme Court in ***Place*** discussed the use of a canine "sniff" test on "seized" luggage at an airport, stating:

> [T]he sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Id. at 707. The Court then concluded "that the particular course of investigation that the agents intended to pursue here - exposure of respondent's luggage, which was located in a public place, to a trained canine - did not constitute a 'search' within the meaning of the Fourth Amendment." ***Id.***

¶22 The Supreme Court cited ***Place*** in ***City of Indianapolis v. Edmond***, 531 U.S. 32 (2000), reinforcing the conclusion that dog sniffs are not searches. In ***Edmond***, the City of Indianapolis had instituted vehicle checkpoints on highways with the purpose of finding illegal drugs. ***Id.*** at 34. After police stopped a vehicle, they would walk a drug-detecting dog around it. ***Id.*** at 35. The Court concluded that the checkpoint program violated the Fourth Amendment because it allowed police to seize vehicles without individualized suspicion and was only for the purpose of finding "ordinary criminal wrongdoing." ***Id.*** at 42, 48. The holding had nothing to do with the use of drug-sniffing dogs, but resulted because vehicles were being stopped, i.e., "seized," without reasonable suspicion. Citing ***Place***, the Court noted that the "fact that officers walk a narcotics-detecting dog around the exterior of each car … does not transform the seizure into a search." ***Id.*** at 40.

¶23 Therefore, dog sniffs are not searches. The logic of ***Place***–that dog sniffs intrude on no legitimate privacy interest–would apply equally in this setting.

Here the officers and the dog were in a common area—outside the apartment door. There was no search.

¶24 Alternatively, Brown argues that if information from a police dog can provide probable cause to search, there must be a showing of the training and capabilities of that particular dog. Because those factors were not shown in this case, Brown reasons the dog sniff cannot be used to establish probable cause.

¶25 Brown relies on ***State v. Secrist***, 224 Wis. 2d 201, 211, n.8, 589 N.W.2d 387 (1999), which states:

> Even a trained dog's smelling of controlled substances - in situations where a human being might not be able to detect the same odor - has been found to provide probable cause for a search. "In light of the careful training which these dogs receive, an 'alert' by a dog is deemed to constitute probable cause for an arrest or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband." 1 LaFave, *Search and Seizure*, § 2.2(f), at 450 (3rd ed. 1996) ….

¶26 The quotation in ***Secrist*** addresses situations where the only information supporting probable cause is a dog sniff. In those situations, without any indication of illegal activity, it is reasonable to require the State to establish a dog's reliability before finding probable cause.

¶27 The State argues that probable cause in this case is based on more than just the dog sniff. Here, the police also knew that a confidential informant had purchased drugs from Brown at his apartment one month earlier. The State concludes that this is enough to establish probable cause.

¶28 We are not convinced. As stated, the drug sale was over one month before the search. The record reveals no evidence about drugs in the apartment or

Brown's activities in the intervening time. Perhaps if Brown had told the informant that he keeps drugs at the apartment, this would have been enough to establish probable cause. However, a one-month-old drug sale and a dog sniff do not establish probable cause. In order to have probable cause, the State was required to show either the dog's reliability or additional facts about the presence of drugs in the apartment.

¶29 The State alternatively requests a remand to present evidence on probable cause. Brown objects, claiming that the record was fully developed and that the State should have made this request at the trial level.

¶30 We disagree. Brown himself has pointed out that the record is silent as to the dog's training and capabilities. Thus, his own argument establishes that the record is not fully developed.

¶31 Further, the evidentiary hearing was based on Brown's original claim that Tousignant's consent was obtained by fraud. Brown argued that the officers deceived Tousignant into thinking that they were trying to obtain a warrant. The evidence focused on that issue. The court found there was no fraud; the officers were in fact trying to get a warrant. The State cannot be faulted for failing to present evidence on an issue—probable cause—about which it had no notice.

¶32 The circuit court, at the end of the evidentiary hearing, raised the issue of the officers' authority to impound the apartment while they were seeking a warrant. The court asked for briefs. In the briefs, for the first time, ***McArthur***

was cited.[1] In his brief and later argument, Brown contended, among other things, that there was no probable cause for a search warrant. However, by that time, the evidence had already been presented. The court was only entertaining legal argument. Certainly, the State could have requested the court to reopen the record to allow additional evidence. However, its failure to do so cannot be construed as any kind of waiver.

B. Reasonable Efforts

¶33 Brown argues that the police did not make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. Specifically, he contends that the police did not make reasonable and diligent efforts to obtain a search warrant. The arrest took place at approximately 3 p.m. while the consent was not signed until almost 8 p.m. Brown concludes that there is nothing in the record to explain why it took so long to try to obtain a search warrant.

¶34 However, the circuit court found that the officers made diligent efforts to investigate and to establish that there was a fair probability that a search of the apartment would turn up drugs. After Brown's arrest, police called in a police dog to determine the presence of drugs at Brown's apartment. Then the officers attempted to secure a search warrant and were still trying to get a warrant when Tousignant consented to the search. The record supports the court's

[1] This case was originally filed on September 7, 2000. The original suppression motion was filed on November 6, 2000. ***Illinois v. McArthur***, 531 U.S. 326 (2001), was not decided until February 20, 2001. Therefore, Brown could not have included ***McArthur*** in his suppression motion because it had not yet been decided.

findings. These findings will not be overturned because they are not clearly erroneous. ***Eckert***, 203 Wis. 2d at 518.

C. Time Restraints

¶35 Brown argues that the police could have easily obtained a search warrant in the amount of time between his arrest and Tousignant's consent. Therefore, Brown concludes that the seizure of the apartment lasted far longer than necessary.

¶36 However, ***McArthur*** was not concerned with the length of time the officers were at the house, but rather the length of time the restraint was imposed on McArthur's personal liberty. ***McArthur***, 531 U.S. at 332. Here, it is irrelevant how long the police were outside Brown's apartment before Tousignant arrived. What is important is whether Tousignant's personal liberty was restrained for an unreasonable length of time. Tousignant arrived at approximately 7:40 p.m. and signed the consent to search form fifteen minutes later. We conclude that the police did not restrain Tousignant's personal liberty for an unreasonable length of time.

CONCLUSION

¶37 The State's request for a remand is granted. The circuit court may hear additional evidence and make findings on whether there was probable cause to secure a search warrant. If there was probable cause, Brown's motion will be denied. If there was not, the motion will be granted and the court should grant further relief as is necessary.

By the Court.—Judgment and order reversed and cause remanded with directions.

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