COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0483-CR **Cir. Ct. No. 01CF004581**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS J. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Travis J. Smith appeals *pro se* from a judgment entered on jury verdicts finding him guilty of armed robbery with the threat of force and false imprisonment with the use of a dangerous weapon. *See* WIS. STAT.

§§ 943.32(2), 940.30, 939.63 (2001–02).[1] He also appeals from an order denying his motion for a new trial and from an order denying his motion for reconsideration.[2] Smith claims the trial court erred when it: (1) denied a motion to suppress evidence that was discovered during an allegedly illegal search; and (2) denied his motion for a new trial without holding an evidentiary hearing. Smith also contends that the trial-court judge should have disqualified himself because the judge had an alleged conflict of interest. We affirm.

I.

¶2 Travis J. Smith was charged with robbing the Guaranty Bank at 7901 West Brown Deer Road in the City of Milwaukee. Sara Gardner, a bank employee, told the police that she was standing in the bank's doorway looking through her purse for a key card when a man with a gun came up to her and ordered her to open the door. Gardner opened the door and, once she and the man were inside, the man forced her to open a vault, used duct tape to bind her ankles and wrists together and cover her mouth, and took money and boxes from the vault.

¶3 Smith became a suspect after the police determined that fingerprints they recovered from a roll of duct tape found at the scene were his. They thus

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

[2] Smith's notice of appeal indicates that he is appealing from the judgment of conviction. It does not identify the order denying his motion for a new trial or the order denying his motion for reconsideration. Indeed, Smith filed his notice of appeal before he filed the motion for reconsideration. The State concedes that "since all the papers necessary to [review] the denial of postconviction relief are in the appeal record … the present *pro se* appeal brings before the court both Smith's conviction and the orders denying his postconviction motions" and we agree. *See* WIS. STAT. § 808.075(1) (trial court may entertain motion for reconsideration pending appeal).

included Smith's photograph in a six-person photographic array and showed the array to Gardner. Gardner identified Smith as the man who robbed the bank.

¶4 The police issued a temporary "felony want" for Smith to alert other police departments that Smith was wanted for a bank robbery. A Glendale police officer learned that Smith was staying at a hotel in Glendale and contacted the Milwaukee police department. Two Milwaukee police detectives went to the hotel and arrested Smith as he was entering a hotel room. They found more than $15,000 on Smith and more than $64,000 in a suitcase. The detectives did not have an arrest warrant or a search warrant.

¶5 Smith filed a motion to suppress the evidence recovered from him and his hotel room. He claimed that the warrantless search of his room violated the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution.

¶6 Smith had three consecutive lawyers prior to trial. At a pre-trial scheduling conference, Smith's third lawyer informed the trial court that he could not be prepared by the trial date and Smith told the trial court that he would hire another lawyer. Approximately one week later, Smith told the court that he wanted to represent himself. The trial court questioned Smith about his education, legal experience, knowledge of legal procedure and the rules of evidence, and his ability to go to trial in less than one month. The trial court also warned Smith about the dangers of self-representation. Smith indicated that he was willing to accept the risk and subsequently represented himself at a hearing on his motion to suppress, and at trial.

¶7 The trial court held an evidentiary hearing on Smith's motion to suppress on the morning of Smith's trial. Detective Gary Temp testified that he

was "conducting surveillance" in the lobby of the hotel where Smith was allegedly staying when Smith walked through the hotel's front door. According to Temp, Smith walked directly to a hotel room. As Smith was opening the door, Temp and his partner identified themselves as police officers and told Smith that he was under arrest. Temp testified that they arrested Smith "in the threshold of the doorway, right in the doorway itself." The detectives took Smith inside the hotel room, handcuffed him, and searched him. Temp told the court that they took Smith inside the hotel room "for everybody's safety and concern in case some situation such as a scuffle would develop. The only people involved would be ourselves, and no one else would get dragged into it."

¶8 The detectives found $15,000 in Smith's back pants pocket, $273 in his wallet, and $100 in another pants pocket. They did not find a gun, but Temp testified that, until that point, he considered Smith to be "an armed person." Temp also told the court that they searched a suitcase that was approximately five feet away from Smith on a bed. According to Temp, the suitcase was unlocked. The detectives found a Century fire safe containing $64,000, a coat, and "bait money" from the bank.

¶9 The trial court denied Smith's motion to suppress. It found that the detectives arrested Smith as he was opening the door to his hotel room. It also found that the detectives took Smith into the hotel room to save him the embarrassment of being arrested in the hotel corridor and "also to protect themselves and [Smith] and anyone else who might be passing through the hallway, in case there was a scuffle, or there were weapons involved." It then concluded that the evidence seized was "obtained during [a] reasonable search incident to a lawful arrest."

¶10 As noted, a jury found Smith guilty on both charges. The trial court sentenced him to thirty years in prison on the robbery count, with twenty years of confinement and ten years of extended supervision, and five years on the false imprisonment count, with two years of confinement and three years of extended supervision, concurrent to the robbery sentence.

¶11 Smith filed a *pro se* motion for a new trial. He claimed that the State presented false testimony, altered videotapes from the surveillance cameras at the bank he robbed and the hotel where he had been arrested, and requested an evidentiary hearing. The next day, Smith filed a "supplemental motion," alleging that the police had "manufactur[ed]" the fingerprints recovered from the duct tape.

¶12 The trial court denied Smith's motion in a written decision and order, concluding that Smith's claims were frivolous and "completely incredulous." It also noted that the evidence was overwhelming:

> The defendant was positively and definitively identified as the bank robber by the woman in the bank whom he bound with duct tape. She testified he was the boyfriend of one of the bank's former employees. The defendant was identified not only from a photo array immediately following the bank robbery, but by the eyewitness in court. The defendant was apprehended at the Exel Inn with the money he took, which included the bait money. His fingerprint was found on the duct tape at the bank. The evidence was completely overwhelming. The claims he raises now are without merit and do not demonstrate that any basis exists for granting a new trial.

¶13 Smith filed a motion for "clarification and reconsideration." The trial court summarily denied the motion. Smith made several more requests related to his prior motions. The trial court denied Smith's requests and indicated that "[f]urther motions of this nature will be filed in the file without response."

II.

A. *Motion to Suppress*

¶14 A trial court's ruling on a motion to suppress evidence presents a mixed question of fact and law. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Wilson***, 229 Wis. 2d 256, 262, 600 N.W.2d 14, 17 (Ct. App. 1999). The application of the facts to the constitutional principles is a question of law that we review *de novo*. ***Id.***, 229 Wis. 2d at 262–263, 600 N.W.2d at 17–18. In this case, the material facts are essentially undisputed. Moreover, none of the trial court's findings of historical fact is clearly erroneous. Thus, we apply the trial court's factual findings to the constitutional principles underlying claims of unlawful search and seizure.

¶15 One recognized exception to the general rule against warrantless searches is a search incident to an arrest. *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). A search incident to arrest is permitted to allow 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. ***Murdock***, 155 Wis. 2d at 228, 455 N.W.2d at 622. Thus, 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.'" ***Id.***, 155 Wis. 2d at 229, 455 N.W.2d at 623 (quoting ***Chimel***, 395 U.S. at 763).

¶16 In this case, Smith alleges that the search was not valid because the police could have handcuffed him in the doorway, obviating the need to enter the room. We disagree.

¶17 "Generally, a limited, warrantless search of a motel room incident to the lawful arrest of its occupants is permissible. This principle applies where … the arrest occurs at an entrance way." ***United States v. Burns***, 624 F.2d 95, 101 (10th Cir. 1980) (citation omitted). In this case, it is undisputed that Smith was arrested in the doorway to his hotel room. Under ***Murdock***, the hotel room was an area within Smith's immediate control. ***Id.***, 155 Wis. 2d at 231, 455 N.W.2d at 624 ("[A]ctual accessibility, as a practical matter, cannot be the benchmark determining the authority to search and the reasonableness of the scope of a search incident to arrest. Arrests are tense and risky undertakings during which many activities necessarily happen simultaneously."). Moreover, the detectives knew that Smith might have a gun. Thus, it was reasonable for the detectives to take Smith a few feet into his room to search for weapons. We conclude that the entry into and limited search of Smith's hotel room was a valid search incident to arrest.[3]

B. *Evidentiary Hearing*

¶18 Smith contends that the trial court erred when it denied his motion for a new trial without an evidentiary hearing. We disagree. A defendant is not automatically entitled to an evidentiary hearing. The defendant must allege facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). If

> "the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory

[3] Smith also argues that the detectives did not have the legal authority to enter his room under the exigent-circumstances exception. We do not address this claim because, as we have seen, the police had the authority to enter and search Smith's room as a search incident to his arrest. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

> allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted).

1. Fingerprint Evidence

¶19 First, Smith alleges that the trial court erred when it did not hold an evidentiary hearing on his claim that the State presented false testimony. In his motion for a new trial, Smith asserted that Judith Immel, an identification technician, falsely testified that the fingerprints from the duct tape were his. To support this claim, Smith pointed to Immel's testimony that, after entering the fingerprints into the Automated Fingerprint Identification System, the computer told her that the primary candidate had the Crime Information Bureau identification number 329736. Immel later testified that Smith's identification number was 206624. Smith thus argued that the fingerprints that Immel processed could not have been his.

¶20 Smith also alleged that the police "manufactur[ed]" evidence. Specifically, he claimed that Exhibit 37, the latent fingerprint lift cards presented at trial, were "manufactur[ed.]" To support this claim, Smith alleged that lift cards he personally examined before trial were smaller than the cards in Exhibit 37 and were not marked on the back like Exhibit 37 was. Approximately one month later, Smith also submitted to the trial court a photocopy of what he alleged were the smaller lift cards to the trial court with his motion for reconsideration.

¶21 These allegations are factually insufficient to warrant an evidentiary hearing. Smith did not submit any evidence to show that his identification number was 206624, not 329736. His reliance on Immel's testimony is not enough. Smith

does not allege that Immel willfully and intentionally gave false testimony regarding his identification number. Thus, we do not know whether Immel's testimony about the identification numbers was an intentional misrepresentation or a mere discrepancy most likely attributable to a defect in memory or mistake. *See* ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 659–660, 505 N.W.2d 399, 402 (Ct. App. 1993). Moreover, the photocopy of the lift cards that Smith submitted to the trial court simply showed two fingerprints. There are no markings on the cards showing whose fingerprints were on the cards or where the cards came from. Without more, we cannot evaluate Smith's claims that the fingerprint cards used at trial were not the cards the police used to identify Smith.

2. Videotapes

¶22 Second, Smith alleges that the trial court should have held an evidentiary hearing on his claim that videotapes from surveillance cameras at the bank and the hotel had been altered. This claim, however, is conclusory and undeveloped. Smith does not allege what exculpatory evidence was removed from the tapes when they were duplicated or what basis he has for believing that the alleged evidence would have been exculpatory.[4] Accordingly, the trial court properly denied Smith's motion for a new trial without holding an evidentiary hearing.

[4] Smith does not challenge the use of duplicate copies of the tapes in his brief on appeal. *See* WIS. STAT. RULE 910.03 (generally, a duplicate is admissible to the same extent as an original).

C. *Trial-Judge Disqualification*

¶23 After the jury was selected and the trial court was about to adjourn on the afternoon prior to the start of the trial, the trial judge told the parties that he owned "a few shares of stock in Guaranty Bank" and asked the parties if this would be a "problem":

> THE COURT: Before I forget again in the interest of a full disclosure, I forgot to mention this earlier. I had mentioned it in another case, and I forgot to do it in this case.
>
> As it turns out, I have a few shares of stock in Guaranty Bank that I've had for some number of years. It's not enough to make any difference to anybody, but I think I should mention that to you. So if that's a problem for either of you[,] you can let me know, and we'll have to take whatever action is appropriate. Do you have any problem with that?
>
> [PROSECUTOR]: I have no difficulty.
>
> THE COURT: Mr. Smith, any problem?
>
> MR. SMITH: No, Your Honor.
>
> THE COURT: Okay. Then we'll get you here early tomorrow morning.

Smith claims that the trial judge should have recused himself from Smith's trial under WIS. STAT. § 757.19. Section 757.19(2)(f) requires a trial judge to recuse himself or herself "[w]hen a judge has a significant financial or personal interest in the outcome of the matter." The parties may waive any disqualification, however, "after full and complete disclosure on the record of the factors creating such qualification." § 757.19(3).

¶24 In this case, it is clear from the discussion set out above that Smith waived any disqualification that may have flowed from the trial-court judge's

stock ownership. Smith relies on his *pro se* status, however, to argue that his waiver was invalid because he "did not know at the time [the] Judge disclosed, that he could ask the Judge to recuse himself, or that the Judge was disqualified … because the Judge did not explain that he was offering to get off the case." Smith's *pro se* status does not excuse his waiver. "While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law." ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20 (1992).

By the Court.—Judgment and orders affirmed.

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