COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1129-CR **Cir. Ct. No. 03CM002386**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBIN JEAN SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Reversed and cause remanded with directions*.

¶1 CURLEY, J.[1] Robin J. Sanders[2] appeals from a judgment, entered after a guilty plea, convicting her of one count of possession of cocaine, in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

[2] Throughout the record, there are several references made to the two different names by which she is known—Robin Sanders and Robin Carey—with one being her maiden name, and the other, her married name. For simplicity, we will refer to her only as Sanders, as that is the name that appears on the judgment.

violation of WIS. STAT. § 961.41(3g)(c) (2001-02).[3] She contends that the trial court erred in denying her motion to suppress the evidence recovered from an allegedly unlawful search. Although the search of the area of the bed on which Sanders was sitting when she was arrested was reasonable, the subsequent search of the lamp on the wall was not, as it was outside the area within her immediate control. As such, while the trial court properly denied the suppression motion with regard to the evidence found in and under the bed, the evidence recovered from the lamp—the cocaine base—should have been suppressed. This court therefore reverses the trial court's judgment and remands the cause with directions to reverse the portion of the order denying suppression of the cocaine and for further proceedings consistent with this opinion.

I. BACKGROUND.

¶2 On March 18, 2003, police officers were dispatched to a motel on South Howell Avenue in Milwaukee as a result of a complaint that there was a drug party occurring in one of the rooms. The police determined that the room in which the drug party was allegedly taking place was registered to Sanders. They also discovered that Sanders had an outstanding municipal warrant.

¶3 The police knocked on the door of the motel room, and when Sanders asked who was at the door, they identified themselves as the police. Sanders opened the door, and allowed multiple police officers into the room. She

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

A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(10).

was the only other person in the room and she took a seat on the bed. The officers told her that there was an outstanding municipal warrant for her arrest. Shortly thereafter, they placed her under arrest, and asked her to move from the bed to an adjacent chair, at which time one of the officers began to search the area around the bed. The officer discovered what appeared to be drug paraphernalia—a glass tube for smoking cocaine base, a "Chore Boy," which is some sort of filter, and a lighter—between the mattress and the box spring, and underneath the bed, near where Sanders had been seated.

¶4 There were two lamps on one of the walls of the room, only one of which was lit. While searching the rest of the room, an officer removed the shade from the lamp that was not lit, and discovered that the light bulb had been removed. In its place, there was a plastic bag containing an off-white chunky substance the officer believed to be cocaine base. According to the officer's testimony at the suppression hearing, the lamps were within six feet of where Sanders was sitting on the bed. After describing the concept of the "lunge area"—"the immediate area that a person could easily go for a gun that could injure … any officer that's [sic] present while investigating"—he testified that, given the small size of the room, he considered the whole room to be the lunge area. Despite the officer's purported concern for his safety as the reason for the search, Sanders was never handcuffed.

¶5 Sanders filed a motion to suppress the evidence recovered from the search of her hotel room. At the motion hearing, Sanders argued that not only did the police officers search outside of the lunge area, but also "they put themselves in the position of needing to search." She insisted that the safest place to arrest her would have been at the door, but instead, they wanted to go into the room to check for a drug party. She contended that when the officer began to search the room, it

"was not a search of the lunge area for officers' safety; this was a full-blown search of the hotel room looking for the drugs that … the caller … had said w[ere] in the room[,]" and that search was outside the scope of ***Chimel v. California***, 395 U.S. 752 (1969). She insisted that the police searched areas that were not within her immediate control, and, moreover, "that the initial need to search for officers' safety was an environment created by the officers, an environment that did not need to be created, that could have easily been remedied by [her] being arrested at the hotel room door when they realized it was her[.]"

¶6 The trial court denied the motion noting that Sanders gave consent for the police to enter the motel room, the police did not have a duty to arrest her at the door, and there is no way to determine whether it would have been safer or more appropriate for the officers to arrest her at the door or proceed as they did. The trial court found that while the officer's testimony that he performed the search to secure his own personal safety was self-serving, the law under ***Chimel*** and ***State v. Murdock***, 155 Wis. 2d 217, 455 N.W.2d 618 (1990), indicates that "even if the defendant is restrained, … the area incident to the search and incident to the arrest may be searched." The trial court found that Sanders could have reached under the bed and under the lampshade, and thus that the search of the "lunge area" was lawful.

¶7 Sanders subsequently pled guilty to one count of possession of cocaine, in violation of WIS. STAT. § 961.41(3g)(c). She was sentenced to two years of probation and her license was suspended for six months. She now appeals.

II. ANALYSIS.

¶8 Sanders recognizes that ***Murdock*** is the controlling law in Wisconsin with regard to the subject of searches incident to arrest, but insists that the facts of her case are "vastly different" from those in ***Murdock***. She also argues that the search exceeded the scope of a permissible warrantless search incident to arrest because: (1) there was no destructible evidence to discover or preserve; (2) the search was not related to officer safety; and (3) the search was a fishing expedition to discover illegal drugs.

¶9 In reviewing an order concerning the suppression of evidence seized incident to a lawful arrest, we apply a two-step analysis. We will uphold the trial court's determination of historical or evidentiary facts unless they are against the great weight and clear preponderance of the evidence. ***Murdock***, 155 Wis. 2d at 225. However, whether a particular place is an area from which a defendant might secure a weapon is a question of constitutional fact that we review independently of the trial court's findings. ***Id.*** at 226. Furthermore, whether the facts satisfy the constitutional requirement of reasonableness also presents a question of law that we review *de novo*. ***Id.***

¶10 "It is well-established that the [F]ourth [A]mendment does not prohibit all searches and seizures but only those that are unreasonable." ***Id.*** at 227. The "Supreme Court has consistently held that warrantless searches are *per se* unreasonable under the [F]ourth [A]mendment, subject to a few carefully delineated exceptions[,]" one of which is a search incident to an arrest. ***Id.*** It is well established that when an arrest is made, it is reasonable for the police officer to search the person arrested in order to remove any weapons or seize any evidence on his or her person. *See* ***Chimel***, 395 U.S. at 763. Furthermore, in

Chimel, the Supreme Court explained that "[t]here is ample justification … for a search of the arrestee's person *and* the area 'within his [or her] immediate control'—construing that phrase to mean the area from within which he [or she] might gain possession of a weapon or destructible evidence." ***Id.*** (emphasis added). However, the Court also pointed out that "[t]here is no comparable justification … for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." ***Id.***

¶11 In ***Murdock***, our supreme court concluded that consideration of actual accessibility to the area searched is unnecessary, as "the ***Chimel*** standard authorizes a contemporaneous, limited search of the area immediately surrounding the arrestee measured at the time of the arrest[,]" ***Murdock***, 155 Wis. 2d at 236, and "[t]he fact of a lawful arrest automatically authorizes the search[,]" ***id.*** at 234. In that case, Murdock, and two others, were arrested and handcuffed, and lying face down on the floor when the search was commenced incident to their arrest. They were cooperative, and there was no indication that they would attempt to resist or escape. The room was small, estimated to be approximately 10 x 12 feet or 12 x 14 feet, and had a pantry-type closet attached, which was open (or had no door) at the time of the arrest. Murdock's head, while he was lying on the floor, was approximately three or four feet from the pantry. An officer looked into the pantry and saw a .22 caliber bullet on the shelf. He seized the bullet, searched through the three closed drawers in the pantry, and subsequently seized a short-barreled rifle. The supreme court held that the search was reasonable, concluding

that the pantry was within Murdock's area of immediate control and refusing to adopt the "accessibility" consideration urged by Murdock. *See* ***id.*** at 236.

¶12 Here, although the trial court ultimately concluded that the search was reasonable, it did also note that "with respect to the search, it … sure appears that the purpose of the search was to find drugs." The trial court continued: "One of the reasons I say that is that they searched the dresser drawers and searched the bathroom, in addition to the area within which could—under the most, the greatest area of imagination that [Sanders] could reach." It determined, however, that Sanders could theoretically reach under the bed and under the lampshade, and thus the search of those areas was reasonable as they were within the area of her immediate control. The trial court commented that the fact that the officers moved Sanders from the bed to the chair—and the chair was allegedly near the lampshade—was not an indication that "the move was pretextual just to get the right to search the area" because "the officers really did not know at the time that [Sanders] was moved from the bed to the chair, that the crack was under the lampshade." The trial court concluded that ***Murdock*** mandated the denial of the suppression motion. The trial court also specifically stated that it did not need to make any specific findings with regard to the search of the other areas, i.e., the rest of the hotel room, because the evidence was recovered from areas within Sander's immediate control.

¶13 Although the officer's stated purpose for the search—safety—seems self-serving in light of the circumstances, the search of the bed near where Sanders was sitting was indeed reasonable, under both ***Chimel*** and ***Murdock***, as it was an area within her immediate control. This court cannot conclude, however, that the concealed area under the shade of a lamp mounted on the wall approximately six feet away from Sanders was an "area from within which [she] might gain

possession of a weapon or destructible evidence." *See* ***Chimel***, 395 U.S. at 763. That portion of the search was unreasonable as it was outside the area within her immediate control and there is no justification "for searching through all … [of the] closed or concealed areas in that room itself[,]" *see* ***id.***, absent a well-recognized exception or a warrant, *see* ***id.***

¶14 It appears as though the trial court may have had some reservations about the search, but felt bound by ***Murdock*** to deny the suppression motion in its entirety. Upon further reflection, this court cannot conclude that ***Murdock*** mandates such an outcome with regard to the evidence seized from under the lampshade. ***Murdock*** and ***Chimel*** authorize contemporaneous, limited searches of the area immediately surrounding the arrestee—the area within the arrestee's immediate control. "That search is reasonable per se if confined to the immediate area surrounding the arrestee at the time of [her] arrest." ***Murdock***, 155 Wis. 2d at 222. The mounted lamp does not reasonably fall within that area. As such, this court therefore reverses the trial court's judgment and remands the cause with directions to reverse the portion of the order denying suppression of the cocaine and for further proceedings consistent with this opinion.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.