COURT OF APPEALS
DECISION
DATED AND RELEASED

August 9, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0739-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN ANDERSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Brian Anderson appeals from a judgment convicting him of possession of marijuana with intent to deliver, in violation of §§ 161.14(4)(t) and 161.41(1m)(h)2, STATS. He also appeals from an order denying his motion for postconviction relief. He argues that the evidence seized from his home should have been suppressed because the warrant authorizing the search was not supported by probable cause. He also argues that the evidence obtained from a search of his safe deposit box should have been suppressed because that search resulted from the illegal search of his home and because his wife was coerced into consenting to the search of the box.

The evidence supports the trial court's determinations that the search warrant was based upon probable cause and that Anderson's wife voluntarily consented to the search of the safe deposit box. We therefore affirm both the judgment and the order.

The search warrant issued in this case authorized police to search Anderson's home in Kenosha, Wisconsin, for cocaine and paraphernalia or documents related to the possession, use or distribution of cocaine. The affidavit upon which the search warrant was based set forth information provided to police by a confidential informant. In support of his claim that the evidence seized from the search of his home should have been suppressed, Anderson contends that the affidavit submitted in support of the search warrant did not establish probable cause to believe that cocaine or materials related to its use or distribution would be found in his home. He also contends that the affidavit failed to provide sufficient information to establish the veracity and basis of knowledge of the confidential informant.

When reviewing the sufficiency of an affidavit filed in support of a search warrant, courts must give great deference to the issuing magistrate's determination of probable cause. ***State v. Hanson***, 163 Wis.2d 420, 422, 471 N.W.2d 301, 302 (Ct. App. 1991). The task of the issuing magistrate is to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched. ***Id.*** at 422-23, 471 N.W.2d at 302. A determination of whether probable cause exists requires a flexible, common-sense measure of the plausibility of particular conclusions about human behavior and an analysis of the totality of the circumstances. ***State v. Kerr***, 181 Wis.2d 372, 379-80, 511 N.W.2d 586, 588-89 (1994), *cert. denied*, 115 S. Ct. 2245 (1995). Moreover, it is the established policy of the Wisconsin courts that the resolution of doubtful or marginal cases regarding a magistrate's determination of probable cause should be resolved largely by the strong preference that law enforcement officers conduct their searches pursuant to a warrant. ***State v. Higginbotham***, 162 Wis.2d 978, 990, 471 N.W.2d 24, 29 (1991).

The affidavit in support of the search warrant was based on sworn allegations by Gary Smith, a special agent for the Wisconsin Department of

Justice, indicating that earlier in the day on which the search warrant was issued Anderson had been arrested in Minnesota after purchasing one-half of a kilogram of cocaine with $12,000 in cash. The purchase was made from a confidential informant. The affidavit indicated that Anderson had called the confidential informant on March 9, 1992, two days before the sale, and asked him to obtain the cocaine. The affidavit also indicated that Anderson told the confidential informant to call Anderson's house when the arrangements for the sale were made and to tell Anderson to go to the "office," at which time the confidential informant was to call him at a telephone number provided by Anderson. The affidavit further indicated that the number was believed to be the number for a telephone booth somewhere in Kenosha. The affidavit also indicated that the confidential informant confirmed the transaction in a telephone conversation with Anderson on March 10, 1992, and that Anderson met the confidential informant and purchased the cocaine on March 11, 1992, at which time he was arrested.

In the affidavit, Smith also represented that agency records detailed Anderson's involvement with controlled substances dating back to 1982, and that a criminal record check on Anderson revealed that he had been arrested in Florida in 1984 in possession of 426 pounds of marijuana. The affidavit also represented that in March 1991, before the confidential informant began working as an informant, Anderson gave him $180,000 to purchase 160 pounds of marijuana, which the informant picked up in Florida and delivered to Anderson in Kenosha.

This affidavit was sufficient to establish the reliability of the confidential informant and probable cause to search Anderson's home. The veracity of the confidential informant was established based on his participation in the controlled drug transaction which led to Anderson's arrest in Minnesota. *See* ***Hanson***, 163 Wis.2d at 423-24, 471 N.W.2d at 302. Similarly, the successful completion of the controlled buy established that the confidential informant had firsthand knowledge of Anderson's drug involvement and that the information provided by him was not based on mere rumor or hearsay.

Standing alone, the confidential informant's participation in the successful controlled buy permitted the magistrate to determine that the information provided by him was reliable. *See* ***id.*** His reliability was further corroborated by the existence of law enforcement records revealing that

Anderson previously had been involved in drug dealing, including being arrested in Florida in 1984 and found to be in possession of 426 pounds of marijuana.

Anderson contends that even if the confidential informant was reliable, the affidavit failed to establish a nexus between the evidence sought and his home, and thus failed to establish probable cause to search his home. We disagree. The search warrant authorized law enforcement authorities to search Anderson's home for cocaine or materials related to the use or distribution of cocaine, including drug paraphernalia and records, receipts and notes. The affidavit also indicated that Anderson told the confidential informant to call him at his home when arrangements for the sale were made. Since Anderson thus was using his home to make at least some of the arrangements for a drug transaction, it was reasonable to conclude that some evidence of drug dealing might be found there, including records of purchases or sales, large amounts of cash, or paraphernalia related to the preparation and distribution of the drugs.

The mere fact that Anderson referred to an "office" and gave the confidential informant another telephone number to call did not render the search of his home unreasonable. Where there is evidence that would lead a reasonable person to conclude that evidence being sought is likely to be found in a particular location, then there is probable cause to search that location, even though a reasonable person could conclude that the evidence might instead be at another location. ***State v. Tompkins***, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988). Where, for example, the facts indicate that evidence of a crime would likely be at one of three locations, probable cause exists to search all three locations. *See* ***id.*** at 123-24, 423 N.W.2d at 826.

Since Anderson used his home to make arrangements for the drug transaction, it was reasonable to conclude that evidence related to drug sales and purchases would be found there, even if he also used another site for arranging drug purchases or preparing and selling the drugs. Consequently, the magistrate properly determined that probable cause existed to search Anderson's home.

Anderson's next argument is that the evidence seized from his safe deposit box should have been suppressed because his wife's consent to the search of the box was involuntary.[1] Voluntariness of a search pursuant to consent must be determined from the totality of the circumstances. ***State v. Nehls***, 111 Wis.2d 594, 598, 331 N.W.2d 603, 605 (Ct. App. 1983). The test for voluntariness is whether consent was given in the absence of actual coercive, improper police practices designed to overcome the resistance of the person from whom consent is sought. ***State v. Xiong***, 178 Wis.2d 525, 532, 504 N.W.2d 428, 430 (Ct. App. 1993). The State has the burden of proving voluntary consent by clear and convincing evidence. ***Id.***

The trial court's findings of historical fact regarding consent will not be disturbed unless they are clearly erroneous. ***Id.*** at 531, 504 N.W.2d at 430; § 805.17(2), STATS. In addition, when a trial court fails to expressly make findings necessary to support its legal conclusion, an appellate court may assume that the trial court implicitly made findings in a way that supports its decision. ***State v. Wilks***, 117 Wis.2d 495, 503, 345 N.W.2d 498, 501 (Ct. App. 1984), *cert. denied*, 471 U.S. 1067 (1985). However, we independently apply constitutional principles to the facts as found to determine whether consent was voluntary. ***Xiong***, 178 Wis.2d at 531, 504 N.W.2d at 430.

Anderson argues that his wife consented to the search of the safe deposit box because during the search of their home she was improperly threatened with arrest and with having her children taken to foster homes if she did not consent. He also argues that even if his wife was not specifically threatened, her consent must be deemed involuntary because the environment in which the search was conducted was coercive. He bases the latter claim in part on the fact that the search occurred at 10:45 p.m. and was conducted by

[1] The police seized $7180 in currency and some mortgage documents and notes from the safe deposit box. We believe that the seizure of this evidence might have been harmless beyond a reasonable doubt. At the time of his arrest, Anderson was purchasing cocaine with $12,000 in cash. The search of his home led to the seizure of marijuana packaged in plastic bags, a triple beam balance scale and $2420 in currency. Based on the strength of the other evidence indicating that Anderson possessed the marijuana with intent to deliver, the seizure of the additional evidence from the safe deposit box may have been harmless, even assuming arguendo that it was error. However, since the State has not raised this issue, we will not address it further or rely on it in affirming the trial court's judgment and order.

two special agents, four police officers, a deputy district attorney and a police dog, while Anderson's three young children were home in bed.

Based on the testimony at the pretrial hearing on Anderson's motion to suppress, the trial court concluded that Anderson's wife freely and voluntarily consented to the search of the box. In making this determination, the trial court implicitly found that the law enforcement authorities were credible when they testified that Anderson's wife was not threatened with arrest and was not told that her children would be placed in foster care if she refused to consent to the search of the box. The trial court's findings cannot be deemed clearly erroneous.

At the pretrial hearing, Anderson's wife testified that Smith threatened to arrest her if she did not cooperate and consent to the search of the box and told her that she would be taken downtown and her children would be placed in foster care. At other points in her testimony, she testified that Smith did, in fact, arrest her, and that he handcuffed her and read ***Miranda*** rights to her. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). While asserting that Deputy District Attorney Glen Blise left the premises before she signed the written consent to the search, she also testified that he told her that her children would be taken to foster homes if she did not cooperate fully. In addition, she testified that when the police left, she was told not to open the door, use the telephone, or leave the apartment until after Smith called to say that the search of the safe deposit box was complete, and that if she violated this order, the police would come back and arrest her.

Two neighbors testified that they listened through the vents and an adjoining wall during the search and overheard the police tell Anderson's wife that her children would be placed in foster care if she did not cooperate. In addition, an attorney contacted by Anderson's wife the day after the search testified that she told him that she was concerned about her children being taken away and was concerned that she was violating a police order by talking to him.

While acknowledging that Anderson's wife was handcuffed for the safety of the officers as they entered the home, Smith also testified that the handcuffs were removed after ten minutes, a fact conceded by Anderson's wife.

In addition, he testified that she was never told she was under arrest or threatened with arrest and was never told that her children would be placed in foster care if she did not cooperate.[2] He testified that when asking Anderson's wife to consent to the search of the box, he read her the Fourth and Fourteenth Amendments to the United States Constitution, and told her that she was not required to consent. He further stated that when she gave her consent, she indicated that it was all right for the police to search the box because they would find nothing but financial documents. In addition, while he acknowledged advising her that talking to others might impair Anderson's ability to cooperate and reach an agreement with law enforcement authorities concerning the charges against him, he denied ordering her not to tell anyone about the search or telling her not to call a lawyer.

Smith's testimony was corroborated by the testimony of Blise, who accompanied the officers in the execution of the search. Blise testified that he was present from the time police entered the home to execute the search until after the consent form was signed by Anderson's wife. He testified that he was present during the discussions between Smith and Anderson's wife concerning

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[2] Anderson points out that at the pretrial hearing, Smith also testified that he never read Anderson's wife her ***Miranda*** rights, and he intervened to prevent another officer from reading her those rights because she was not under arrest. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). During postconviction proceedings, Smith's written report concerning the search was admitted into evidence and indicated that Smith had personally read Anderson's wife her ***Miranda*** rights. While Anderson argues on appeal that Smith's testimony regarding the conduct of the search should be deemed incredible based on the report, we note that this evidence was introduced in support of a postconviction motion filed by Anderson alleging ineffective assistance of trial counsel. The trial court found no ineffective assistance, and Anderson has not challenged that ruling on appeal.

Since the trial court's postconviction ruling on the ineffectiveness claim is not before us and since the report was not in evidence when the trial court denied the motion to suppress, we doubt that any basis exists for this court to consider the report. However, even if we could consider it, it does not provide a basis to disturb the trial court's determination that consent to the search was freely and voluntarily given. Smith explained in postconviction proceedings that in his pretrial testimony, he meant only that ***Miranda*** warnings had not been given to Anderson's wife when the police entered the home and handcuffed her. He testified that ***Miranda*** warnings were given only after contraband was discovered in the home. The trial court was entitled to accept this explanation as true. Moreover, even if the report and testimony are deemed inconsistent, the trial court was still entitled to determine that Smith was truthful when he testified that Anderson's wife was not threatened with arrest or told she was under arrest, nor told that her children would be placed in foster care if she failed to consent to the search of the box.

the signing of the written consent form and witnessed its signing. He indicated that it was signed within fifteen to twenty minutes of the time the key to the safety deposit box was found. He also confirmed that Anderson's wife had asked earlier what would happen to her children if she was arrested, and she was told that a crisis agency probably would be called. However, he denied ever hearing anyone tell her that if she did not cooperate her children would be removed from her and denied that she was threatened or coerced when the consent was signed.

The trial court was entitled to believe the testimony of Smith and Blise and to disbelieve the testimony of Anderson's wife and neighbors. *See* ***Turner v. State***, 76 Wis.2d 1, 20, 250 N.W.2d 706, 716 (1977). Based on the testimony, the trial court was also entitled to conclude that the police engaged in no improper, coercive activities, whether overt or subtle. The testimony of Smith and Blise supported a finding that the police handcuffed Anderson's wife for only a short time to insure their own safety, spoke to her in a firm but nonthreatening manner and permitted her to care for her children, a fact confirmed by Anderson's wife. Their testimony also supported a finding that Anderson's wife initiated questions concerning what would happen to her children if she was arrested, and that she received an honest answer indicating that a crisis agency might be called to care for them. However, since the testimony of Smith and Blise also indicated that she was never told she would be arrested or that her children would be taken if she did not cooperate, the trial court was entitled to find that the discussion concerning the children was neither coercive nor improper. Similarly, the trial court was entitled to believe Smith's testimony that he advised Anderson's wife that talking to others about the search might impair Anderson's ability to cooperate with law enforcement authorities but did not order her to refrain from speaking to anyone.

The trial court acted within the scope of its fact-finding powers when it chose to give little credence to the conflicting testimony of Anderson's wife, finding that she was distracted by the events and her concern for her children, and thus was confused about exactly what occurred. Similarly, the trial court was entitled to disbelieve the testimony of the neighbors, noting that they were in an adjoining apartment listening through a door and vent, and thus could easily misunderstand what was being said or its context, particularly in light of the additional testimony by one of the neighbors indicating that the police were not yelling or speaking roughly or angrily and that some of the conversation was muffled.

The consent also was not rendered coercive merely because Anderson's wife was upset over the nighttime search and concern for her children. *See* ***Nehls***, 111 Wis.2d at 599, 331 N.W.2d at 606. No basis therefore exists to disturb the trial court's denial of the motion to suppress.

By the Court.—Judgment and order affirmed.

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