COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1996

No. 95-3152-CR

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

State of Wisconsin,

Plaintiff-Appellant,

v.

Anthony Johnson and
Sharon A. Johnson,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Reversed.*

SCHUDSON, J.[1] The State of Wisconsin appeals from the trial court order granting the defense motion to suppress evidence. This court reverses.

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

The facts relevant to resolution of this appeal are not in dispute. The trial court found:

> [O]n October 18, 1994, [Milwaukee Police] Officer [Victor] Centeno was involved with the Gang Crimes Intelligence Division of the police department, he had arrested several people with a quantity of narcotics across the street from the defendants' tobacco store, that the officers observed that some of the people who had been released went to the defendants' store across the street, that particularly one person went inside and one waited outside.
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> The officers were concerned there may be a connection between the marijuana that was involved across the street from the tobacco store and the smoke shop itself.
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> The officers went into the store believing it was a licensed premises so that they would be entitled to conduct a search of the premises and particularly to check on the licenses. The store apparently was open to the public.
>
> The officers went into the store.... Officer Centeno observed inside the store several items of drug paraphernalia inside a glass case that was visible in the public area of the store. The officer then went behind the counter in an area that might otherwise be used by employees to search and look for the licenses. He observed that the licenses that were on display were an expired cigarette license and expired food seller permit. He also observed some other licenses, he can't recall what they were, whether they were current or not current. The officer again described the numerous items of drug paraphernalia that he saw inside the glass counter, again visible as he walked in, and he testified that those items he saw were used to consume or manufacture narcotics.

The defendant Mrs. Johnson was present on the premises and was identified as the manager. Subsequently her husband, Mr. Johnson, the other co-defendant, arrived and was indicated to be the owner of the premises.

The officer in going behind the counter to check on licenses was also concerned that as a licensed premises it may have some firearms and for officers' safety he then was looking for any firearms so that no one would pull a firearm on him during the course of the inspection. The officer searched behind the counter and went below the glass counters and opened some doors that were behind and found, again, several more items of drug paraphernalia. The officers were informed by the defendants that they didn't know they were doing anything wrong.

The officers confiscated the observable items, the items they were observing, and informed the defendants that their sale of those items was illegal and that they would be back again to check again on the licensed premises in the future.

The officers then came back on January 26 for the purpose of inspecting the licensed premises. They came into the premises. Apparently at that time coincidentally as they were coming into the premises they saw someone who was a suspect in a narcotics matter and the suspect then ran into the store, the officers ran into the store, past the counter, and apprehended the suspect.

[Milwaukee Police] Officer [Robert] Menzel went through the entire store into the areas way into the back of the store to storage areas checking to see if there were any other people there, again concerned with officer safety, checking if there might be someone else there that might have some weapon, that they wanted to be secure, that there was not somebody else there that would be interfering with

> their apprehension. When he was way in the back of the store he then discovered a closet area that did not have a door but then in plain view where he was standing he had items of drug paraphernalia.
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> The other officers, including Officer Centeno, went behind the counters of the store. Again they said, or the officers testified there were some items of drug paraphernalia visible in the glass cases, and the officers went behind the glass cases and underneath the glass cases from the employee area, found several of the other items of drug paraphernalia.

On October 18, 1994, the police found large quantities of ziploc bags, pipes, cocaine grinders, test tubes, copper mesh screens, and other items. Most were in plain view inside the glass counter located in the public entry area of the store. Below the counter the police found "[m]ore of the same." On January 26, 1995, the police found similar items as well as scales and "several kinds of powder," which Officer Centeno believed "are used for mixing cocaine." Centeno testified that on this second occasion some of the items were in plain view in the glass case, but most "were pretty much all in the first part of the store by the glass counter, underneath and behind, and there were some items also taken from a storage [area] in the back."

The State charged the Johnsons with two counts of possession with intent to deliver drug paraphernalia, party to a crime. The trial court granted the defendants' motion to suppress the seized items, relying on ***See v. Seattle***, 387 U.S. 541 (1967), and ***State v. Schwegler***, 170 Wis.2d 487, 490 N.W.2d 292 (Ct. App. 1992). The trial court concluded that these warrantless seizures were unreasonable. The trial court, however, observed:

> What strikes me as strange is that if the officers would have said, well, as long as they were in the area they just stopped by to buy some tobacco and went in as a customer to buy some tobacco, they saw the drug paraphernalia, they could have confiscated it and that would have been all right. But because the officers are going in there in connection with checking out the premises, for that reason they are

> not allowed. And I guess that causes me some problem in that thought process, but it seems that the two cases [***See*** and ***Schwegler***] are controlling despite what would seem like a normal though process with regard to being in the locations.

The trial court's musings were correct; its reliance on ***See*** and ***Schwegler*** was misplaced.

"[T]he validity of a search and seizure involves constitutional questions subject to independent appellate review and requires an independent application of the constitutional principles involved to the facts as found by the trial court." ***State v. Angiolo***, 186 Wis.2d 488, 494-495, 520 N.W.2d 923, 927 (Ct. App. 1994). A trial court's determination of whether a warrantless search was justified under the "plain view" exception to the warrant requirement is subject to this court's *de novo* review. *See* ***Bies v. State***, 76 Wis.2d 469, 251 N.W.2d 461, 467 (1977).

The Wisconsin Supreme Court explained that a warrantless seizure may be justified under the "plain view" exception to the warrant requirement only where the following criteria are met:

> (1) The officer must have a prior justification for being in the position from which the "plain view" discovery was made;
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> (2) The evidence must be in plain view of the discovering officer;
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> (3) The discovery of the evidence must be inadvertent; and
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> (4) The item seized, in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity.

Bies, 76 Wis.2d at 464, 251 N.W.2d at 464-465. Clearly, the undisputed facts establish that all the criteria were satisfied in both searches.

On both occasions the police had prior justification for being in the store—to investigate a suspected connection between crime and the store, to apprehend a suspect, and to carry out license inspections. On both occasions the police seized items that were in plain view. On both occasions the discovery was inadvertent—there is nothing to suggest that the police expected the store to contain drug paraphernalia on October 18 and, unless this court were to permit the Johnsons to rely on their own disobedience to the warning they received from the police on October 18, there is nothing to suggest that the police expected to find drug paraphernalia on January 26. On both occasions, the seized items provided probable cause of the criminal offenses for which the Johnsons were charged.

See and ***Schwegler*** are distinguishable for several reasons. Most significantly, ***See*** involved the appellant's refusal to permit a representative of the Seattle Fire Department to enter and inspect a "locked commercial warehouse" of a "private commercial property" without a warrant. ***See***, 387 U.S. at 541-543. The Supreme Court concluded "that administrative entry, without consent, upon *the portions of commercial premises which are not open to the public* may only be compelled through prosecution or physical force within the framework of a warrant procedure." ***Id.*** at 545 (emphasis added). Somewhat similarly, ***Schwegler*** involved a county humane officer's warrantless administrative inspection of a horse-breeding operation. ***Schwegler***, 170 Wis.2d at 492, 490 N.W.2d at 294. Neither case involved a store open to the public and to any police officer who, for whatever reason, might choose to enter.

Moreover, under several statutes cited in the State's excellent brief, police are authorized to enter and inspect tobacco stores to assure compliance with licensing requirements. *See*, *e.g.*, § 139.39(2), STATS. ("any ... police officer ... may at all reasonable hours enter the premises of any permittee or retailer ... and may enter and inspect any premises where cigarettes are made, sold or stored").

Therefore, this court concludes that the trial court erred in concluding that the searches and seizures were unreasonable. This court notes, however, that the defense moved to suppress "at this point based on the

evidence thus far submitted," after the State had presented its three witnesses and, in their brief to this court, the Johnsons state that they had nine more witnesses. The trial court prefaced its decision by stating, "[a]t this point the facts show ...," and granted the defense motion at the conclusion of the State's evidence. Additionally, given the trial court's decision, it did not make factual findings drawing any distinctions that may have existed between public and private areas of the premises, and between seized items in or out of plain view. Thus, although this court reverses the trial court order, this court does not foreclose the trial court from allowing for the presentation of additional evidence.

By the Court. – Order reversed.

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