



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 30, 2014

To:

Hon. John R. Race
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Melissa D. Robe
Robe Law Office
P.O. Box 191
Oak Creek, WI 53154-0191

You are hereby notified that the Court has entered the following opinion and order:

2013AP2179-CR

State of Wisconsin v. Thomas M. Fields (L.C. #2012CF292)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Thomas M. Fields appeals from a judgment of conviction entered upon his guilty plea after the trial court denied his motion to suppress physical evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ Because we conclude that the discovery of marijuana in Fields' bedroom was accomplished pursuant to and within the scope of a lawful warrant, we affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Fields was charged with possession of THC as a second or subsequent offense after police discovered marijuana under a lamp in his bedroom while executing a search warrant. The warrant authorized the search of Fields's residence for evidence of a sexual assault, including "a silver folding knife, a black leather belt with a silver buckle, dark colored hooded sweatshirts, and jean pants." The supporting affidavit was signed by Officer Tina Winger and averred that a woman named N.G. reported having been sexually assaulted in Whitewater by a white male with calloused hands who displayed a silver folding knife, had a "distinct and/or crooked nose," and wore "an oversized black hooded sweatshirt with the hood pulled up and cinched around his face." The affidavit asserted that three weeks after N.G.'s assault, Fields was arrested for masturbating while watching a female student in a Whitewater library. Fields was wearing an oversized black hooded sweatshirt with a hole cut in the front pocket through which he touched his penis, and the arresting officer noted that he had a crooked nose and calloused hands. The affidavit stated that though N.G. was unable to identify Fields as her attacker from a photo lineup, she looked at his picture the longest, and reported that she recognized his face and it made her stomach hurt. Winger's affidavit also alleged that she had prior contact with Fields based on complaints of lewd and lascivious behavior.

The trial court denied Fields's motion to suppress the marijuana. On appeal, Fields argues that the trial court erred because (1) the affidavit underlying the search warrant failed to establish probable cause and (2) the search exceeded the scope of the warrant. We disagree.

To establish probable cause sufficient to support the issuance of a search warrant, the record must provide "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched." *State v. Ward*, 2000 WI 3, ¶27, 231 Wis. 2d 723, 604 N.W.2d 517 (citations

omitted). The test for probable cause relies on common sense and is to be determined on a case-by-case basis, examining the totality of the circumstances. *State v. Gralinski*, 2007 WI App 233, ¶15, 306 Wis. 2d 101, 743 N.W.2d 448. In the warrant context, a probable cause determination must equate to more than a mere possibility, but need not rise to the level of more likely than not. *See State v. Sloan*, 2007 WI App 146, ¶23, 303 Wis. 2d 438, 736 N.W.2d 189. On review, we accord great deference to the warrant-issuing judge's probable cause determination. *State v. Romero*, 2009 WI 32, ¶18, 317 Wis. 2d 12, 765 N.W.2d 756.

We conclude that Winger's affidavit established probable cause to believe that evidence of a sexual assault would be found in Fields's house. N.G. described her attacker as having a crooked nose and calloused hands, characteristics which were sufficiently distinctive as to be noted by Fields's arresting officer. *See State v. Cheers*, 102 Wis. 2d 367, 390, 306 N.W.2d 676 (1981) (probable cause to arrest where defendant matched the suspect's description, including the "specified descriptive characteristic" of a pockmarked face). Fields was arrested only weeks later for committing another sex crime in Whitewater and had prior police contacts for lewd and lascivious behavior. *See State v. Lange*, 2009 WI 49, ¶33 & n.14, 317 Wis. 2d 383, 766 N.W.2d 551 (proper for officer to consider suspect's prior drunk driving convictions when determining if probable cause existed to arrest suspect for operating while intoxicated; "a suspect's prior convictions and prior arrests are not barred from consideration on the issue of probable cause" (citations omitted)). Fields's oversized black hoodie, which was used to assist his public masturbation, matched N.G.'s report of her attacker's clothing. Further, though N.G. was unable to identify Fields, the assertions that she looked at his picture the longest and recognized and felt sickened by his face support a reasonable inference that he was her attacker. *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) ("Probable cause is not a technical, legalistic concept

but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.”). Based on the totality of the circumstances, there was more than a mere possibility that Fields assaulted N.G. and that evidence of that assault might be located in his residence.

We also reject Fields’s contention that the discovery of the marijuana was outside of the search warrant’s scope. We agree with the trial court that the marijuana was discovered in plain view. *State v. Ragsdale*, 2004 WI App 178, ¶¶16-17, 276 Wis. 2d 52, 687 N.W.2d 785 (police may seize contraband where (1) it is in plain view, (2) the officer is lawfully in the position from which the contraband is discovered, and (3) its incriminating nature is immediately apparent). At the suppression hearing, Detective Jessamy Flaherty testified that while searching Fields’s bedroom for clothing and the folding knife, she saw a piece of plastic sticking out from underneath a lamp. She then “looked around the side of [the lamp] and very clearly saw the bag of marijuana.” Because Flaherty was lawfully in the bedroom pursuant to a warrant, she was entitled to look around the lamp and seize the obvious contraband in plain view.²

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

² Additionally, Flaherty testified that the sought-after folding knife would have fit under the base of the lamp, which she described as being shaped like a truck or fire engine and “ten or twelve inches long and maybe four or five inches wide.” Thus, even had Flaherty manipulated the lamp in order to discover the marijuana, the search would have been lawfully executed pursuant to the warrant’s scope. *State v. Lacount*, 2008 WI 59, ¶38, 310 Wis. 2d 85, 750 N.W.2d 780 (a premises warrant authorizes the search of all items which are “plausible receptacles of the objects of the search”).

Diane M. Fremgen
Clerk of Court of Appeals