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DISTRICT I

October 5, 2021

To:

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Circuit Court Judge
Electronic Notice

Nicholas DeSantis
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
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John D. Flynn
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Eric R. Hart
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1012-CR

State of Wisconsin v. Richard William Russell
(L.C. # 2017CF5287)

Before Brash, C.J., Donald, P.J., and White, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Richard William Russell appeals a judgment convicting him of one count of possession of cocaine, with use of a dangerous weapon, and two counts of unlawfully possessing a firearm as a convicted felon. Russell argues that the police violated the Fourth Amendment when they searched his car because the plain view exception to the warrant requirement did not apply. After reviewing the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

“The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures.” *State v. Artic*, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. “A search within the meaning of the Fourth Amendment occurs when the police infringe on an expectation of privacy that society considers reasonable.” *State v. Davis*, 2011 WI App 74, ¶8, 333 Wis. 2d 490, 798 N.W.2d 902. “A person has no reasonable expectation of privacy in an item that is in plain view of an officer who has a right to be in the position to have the view.” *Id.*

The plain view exception to the warrant requirement applies when three conditions are met. See *State v. Abbott*, 2020 WI App 25, ¶24, 392 Wis. 2d 232, 944 N.W.2d 8. First, “the evidence must be in plain view.” *Id.* (citation omitted). Second, “the [police] officer must have a prior justification for being in the position from which [her or] she discovers the evidence in plain view.” *Id.* (citation omitted). Third, the evidence seized along with facts known to the police officer at the time of the seizure, must provide “probable cause to believe there is a connection between the evidence and criminal activity.” *Id.* (citation omitted). “The State bears the burden to prove that one of the exceptions to the warrant requirement applies.” *Id.*, ¶12.

At the suppression hearing, Police Officer Jose Rivera testified as follows. He and other police officers responded to a report of shots fired near 3159 North 25th Street in Milwaukee. As they began to search for evidence related to the gunfire, such as blood or bullet casings, they were notified that a victim had arrived at the hospital with a gunshot wound. The only vehicle in the immediate vicinity of the reported gunfire was a black Cadillac parked on the street outside of 3156 North 25th Street. Because it was early evening and already dark outside, he looked inside the car windows with his flashlight. He saw what he suspected to be cocaine based on his extensive experience with drug investigations. The cocaine was in a clear plastic bag in the

center console compartment of the car and in the driver's side door compartment, which was located below the driver's side door handle. After seeing the suspected drugs, he entered the car and found cocaine where he had seen it from outside the car. In addition to Officer Rivera's testimony about what occurred, the State played Officer Rivera's body camera footage at the suppression hearing. The circuit court concluded that the plain view exception to the warrant requirement applied to the police search of Russell's car.

Russell argues that the footage from Officer Rivera's body camera, which was mounted on his right shoulder, contradicts Officer Rivera's testimony that he could see the cocaine through the car window. Russell contends that the body camera footage shows that a white receipt was covering the cocaine in the center console, which means that Officer Rivera could not have seen it from outside the car. Russell also contends that the body camera footage does not show that Officer Rivera leaned over the driver's side window at an angle that would have allowed him to see the cocaine in the driver's side door compartment. For these reasons, Russell argues that the circuit court should have concluded that Officer Rivera's testimony was not credible.

Our standard of review dictates that we accept the circuit court's factual and credibility determinations unless they are clearly erroneous, which is not the situation here. *See State v. Jenkins*, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. Noting that Officer Rivera was experienced with drug investigations, the circuit court found credible Officer Rivera's testimony that he saw what he suspected to be cocaine from outside the car. The circuit court rejected Russell's argument that the body camera footage impeached Officer Rivera's testimony for two reasons. First, the circuit court explained that the body camera video showed only a particular perspective or view, which was more limited than the view that Officer Rivera had. Second, the

circuit court reasoned that even though some of the images in the video were difficult to discern because the flashlight washed them out, the video showed a plastic bag containing an unknown substance in the center console with a receipt on top of it, which corroborated Officer Rivera's testimony, rather than undermined it.

Russell asserts that the circuit court erred because it said that Officer Russell had "greater credibility than [the] video." While the circuit court may have used an inartful turn of phrase in its oral decision, when read in the context of the entire decision it is clear that the circuit court meant that Officer Rivera had a broader perspective than what was shown on his body camera footage. Based on the evidence adduced at the suppression hearing, the circuit court properly concluded that the plain view exception to the warrant requirement applied to the police search of Russell's car.

Upon the foregoing,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals