COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1040-CR **Cir. Ct. No. 2011CF142**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN L. SHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Kevin Shaw appeals a judgment of conviction for possession of tetrahydrocannabinol (THC) with intent to deliver, dealer possession of a controlled substance without a tax stamp, and possession of drug paraphernalia. He claims his residence was subjected to an unreasonable

probation search, and he challenges the sufficiency of the evidence supporting his convictions. We affirm.

BACKGROUND

¶2 In August 2011, Shaw's probation agent received a tip from another probationer that "Kevin" was dealing drugs from 1421½ East Main Street, an address that was being rented to Shaw. Shaw subsequently provided a urine sample that tested positive for THC, and he was placed on a probation hold.

¶3 Shaw's agent, accompanied by a Merrill police officer, searched Shaw's residence. They gained entry from Shaw's landlord and found two individuals inside, Peter Fry and Jessica Gronholm. Drugs and drug paraphernalia were in plain view, including marijuana stems, a grinder, and a scale. The agent then referred the matter to police, who obtained warrants to search the remainder of the residence and a safe found on the porch roof. Police discovered more marijuana and prescription pill bottles in Shaw's name.

¶4 Shaw was charged with possession of THC with intent to deliver, dealer possession of a controlled substance without a tax stamp, and possession of drug paraphernalia. He filed a motion to suppress all evidence found at his residence, asserting the probation search was unreasonable and that the subsequent search warrants were tainted by the initial illegal search. The circuit court denied Shaw's motion and he was ultimately convicted by a jury on all counts. Shaw now appeals.

DISCUSSION

¶5 Shaw first asserts the State lacked a reasonable basis to conduct the warrantless probation search of his residence. "The constitutional legality of a

warrantless search of a probationer's residence by a probation officer raises a question of law." ***State v. Griffin***, 131 Wis. 2d 41, 49, 388 N.W.2d 535 (1986), *aff'd*, 483 U.S. 868 (1987). We review questions of law independently and without deference to the circuit court. *See* ***id.*** However, we will not upset the circuit court's findings of evidentiary or historical fact unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Flakes***, 140 Wis. 2d 411, 426, 410 N.W.2d 614 (Ct. App. 1987).

¶6 A search must be supported by a warrant or probable cause unless the search is made pursuant to a lawful exception. ***State v. Hajicek***, 2001 WI 3, ¶35, 240 Wis. 2d 349, 620 N.W.2d 781. There is an exception to the warrant requirement for probation searches. ***Id.***, ¶36. By its nature, probation places limitations on the liberty and privacy rights of probationers. ***Griffin***, 131 Wis. 2d at 45. Accordingly, "the exception to the warrant requirement for probation searches provides that a probation officer may search a probationer's residence if the probation officer has reasonable grounds to believe that a probationer has contraband." ***Hajicek***, 240 Wis. 2d 349, ¶37; *see also* WIS. ADMIN. CODE § DOC 328.22(2)(a).[1]

¶7 The "reasonable grounds" standard promulgated in WIS. ADMIN. CODE § DOC 328.22(3) satisfies the constitutional standard of reasonableness. ***Griffin***, 131 Wis. 2d at 61.[2] Subsection DOC 328.22(3) provides:

[1] All references to WIS. ADMIN. CODE ch. DOC 328 are to the June 2013 version.

[2] WISCONSIN ADMIN. CODE ch. HSS 328, which the supreme court considered in ***State v. Griffin***, 131 Wis. 2d 41, 388 N.W.2d 535 (1986), *aff'd*, 483 U.S. 868 (1987), was subsequently renumbered WIS. ADMIN. CODE ch. DOC 328.

> **(3)** REASONABLE GROUNDS. In deciding whether there are reasonable grounds to believe that an offender has used, possesses or is under the influence of an intoxicating substance, that an offender possesses contraband, or that an offender's living quarters or property contain contraband or evidence of a rule violation, an employee may consider any of the following:
>
> (a) The observations of employees.
>
> (b) Information provided by informants. In evaluating the reliability of the information and the informant, the employee shall consider the following:
>
> 1. The detail, consistency, and corroboration of the information provided by the informant.
>
> 2. Whether the informant has provided reliable information in the past and whether the informant has reason to provide inaccurate information.
>
> (c) The activity of the offender.
>
> (d) Information provided by the offender.
>
> (e) The experience of the employee with that offender or in a similar circumstance.
>
> (f) Prior seizures of contraband from the offender.

As the regulation's text suggests, an employee need not consider every factor enumerated under § DOC 328.22(3) before conducting a probation search. *See* ***City of Wauwatosa v. Milwaukee Cnty.***, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963) (generally, "may" is construed as permissive and "shall" is construed as mandatory).

¶8 The circuit court found that at the time of the search, Shaw was on probation and supervised by agent Dawn Susa. Susa received a tip from Jason Koenig, another probationer, that marijuana and prescription drugs were being sold at an address Susa knew to be Shaw's. Koenig identified a man named LeBlanc as the purchaser and "Kevin" as the seller. Koenig was dating LeBlanc's

daughter at the time. The information Koenig provided was neither solicited by anyone in the probation office nor obtained by threats or promises.

¶9 After receiving Koenig's tip, Susa requested a urine sample from Shaw. The urinalysis tested positive for THC, the active ingredient in marijuana. Shaw was on probation for a drug offense, and had prior drug convictions. He also had previous supervision violations. Susa's supervisor approved the search.

¶10 Shaw contends the search was unreasonable because Koenig was not a reliable informant and his tip could not be corroborated. It is undisputed that Koenig did not participate in or personally witness the drug transaction. However, his relationship with the alleged purchaser's daughter added credibility to his tip. Koenig identified "Kevin" as the alleged dealer, and Susa matched the address Koenig provided to Shaw's residence. Koenig was also on probation and subject to revocation or sanctions for lying, which provided sufficient disincentive for fabrication. We are not persuaded Susa unreasonably relied on Koenig's tip when determining whether to conduct a search of Shaw's residence.

¶11 In addition, Shaw's failed urine test independently provided sufficient grounds for the search. The test suggested Shaw had recently used marijuana; from this, Susa could reasonably infer that drugs would be found at his residence. The inference is strengthened by Shaw's prior drug offenses and history of noncompliance with conditions of supervision.

¶12 Shaw contends the urinalysis result and his offense history cannot justify the search because "the only reason … Shaw was forced to give a urine sample and call his history of offenses into question was the information supplied by Koenig." Shaw's reasoning is essentially that the tip was insufficient to establish grounds to search, and tainted all subsequent investigative efforts. We

reject this theory for two reasons. First, we have already concluded Susa could reasonably rely on the information Koenig provided. Second, Shaw's rules of supervision required him to submit to urinalysis testing ordered by his agent, without regard to the agent's reason for the request.

¶13 Shaw also asserts we should be "skeptical" of the urinalysis because "nothing about the failed test suggests that Shaw was engaged in drug trafficking or that he had drug contraband in his residence." While we agree the presence of THC in Shaw's urine did not establish that he was dealing drugs, it did strongly suggest he had recently used marijuana. *See* ***State v. Griffin***, 220 Wis. 2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998) (presence of drugs in someone's system is strong circumstantial evidence of prior possession). In turn, it can be reasonably inferred from the urinalysis result that contraband would be found at Shaw's residence. That is all the law requires.

¶14 Shaw next asserts the evidence was insufficient to convict him of possession of the drugs and drug paraphernalia found at his residence. He also contends the State failed to prove he intended to deliver THC.

¶15 "An appellant attacking a jury verdict has a heavy burden, for the rules governing our review strongly favor the verdict." ***State v. Allbaugh***, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989). We will not reverse a conviction unless the evidence, viewed in the light most favorable to the State and the conviction, is so insufficient in probative value that as a matter of law no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990).

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court

> may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507. When faced with a record of historical facts that supports more than one inference, we must accept and follow the inferences drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07.

¶16 We first address whether the evidence was sufficient to allow a trier of fact to find possession, an element of all three offenses. *See* WIS. STAT. §§ 139.95(2) (possession of a controlled substance without a tax stamp); 961.41(1m)(h)1. (possession of THC with intent to deliver); 961.573(1) (possession of drug paraphernalia).[3] "Possession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug." ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977).

¶17 Trial testimony established that most of the drug paraphernalia was found in common areas of the residence. Police discovered a pill grinder on a desk, near a cellophane wrapper that tested positive for oxycodone. Police also discovered a digital scale whose unit of measure was set to grams. Five empty baggies were found in the desk.

¶18 Police also found a safe on the porch roof inside a black garbage bag. When police obtained a warrant to search the safe, they opened it with a key

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

found on a desk in Shaw's residence. Sixty-eight grams of marijuana were found in three plastic bags inside. Police also found prescription pill bottles, which contained approximately two hundred pills. The labels on the pill bottles all bore Shaw's name and address.

¶19 The essence of Shaw's argument is that "the jury did not have sufficient evidence to conclude Shaw exercised control and dominion over [1421½ East Main Street]." He does not dispute police testimony that he lived at that address, nor that he was the only person on the lease.[4] Rather, he claims that his legal right to occupy the premises does not establish the dominion and control necessary for the jury to conclude that any contraband found inside was likely his.

¶20 We are not persuaded. A jury may draw an inference of knowing possession from joint occupancy of premises based on the defendant's access to areas in which drugs are found, the discovery of drugs in plain view, and the presence of items used in the manufacture or packaging of drugs. ***Allbaugh***, 148 Wis. 2d at 813. In ***Allbaugh***, police discovered copious amounts of marijuana throughout a house in which several people lived, although none was found in Allbaugh's bedroom. ***Id.*** We concluded the evidence was sufficient to convict Allbaugh. ***Id.*** at 813, 815-16. The evidence demonstrated dominion and control because the defendant, "as resident owner of his home, had control over the common areas" in which drugs and drug paraphernalia were located. ***Id.*** at 815-16.

[4] Shaw claims "the record does not contain any evidence showing that Shaw was actively living there, such as proof of personal belongings, mail deliveries or eyewitness accounts." To the contrary, two officers directly testified Shaw lived at the address.

¶21 Here, Shaw cannot seriously contend he did not have access to the property that he alone was legally entitled to occupy, and in which drugs and drug paraphernalia were found in plain view. In addition, the safe above the porch was accessible by any occupant using keys found on a desk in the residence. The pill bottles inside the safe had Shaw's name and address on them, strongly suggesting his ownership of the safe's contents and, by extension, paraphernalia like the pill grinder and scale. Even though other individuals were present in Shaw's residence, the police testimony was sufficient evidence from which the jury could infer that Shaw had, at a minimum, joint possession of the contraband.

¶22 Finally, Shaw asserts the evidence was insufficient to establish the "intent to deliver" element of his conviction for possession of THC. He acknowledges that two officers with experience in drug interdiction testified that the typical amount of marijuana for personal use is seven to eight grams. Both officers testified the amount of marijuana found in the safe was consistent with use for distribution or drug trafficking. Shaw contends this evidence established only that police discovered more marijuana than is typically found for personal use, not that Shaw intended to distribute it.

¶23 We easily reject Shaw's argument. The jury could reasonably infer the requisite intent from the amount of marijuana discovered and the officers' testimony. That inference is bolstered by the drug paraphernalia present at the scene, including a digital scale, set to grams, and baggies. While this is not the only inference that can be drawn from the evidence, "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, [we will] not overturn a verdict …." ***State v. Kimberly B.***, 2005 WI App 115, ¶21, 283 Wis. 2d 731, 699 N.W.2d 641.

By the Court.—Judgment affirmed.

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