COURT OF APPEALS
DECISION
DATED AND FILED

September14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2108-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMY REED,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 DYKMAN, P.J. Jimmy Reed appeals from a judgment convicting him of possession of cocaine with intent to deliver. Reed pleaded guilty after the trial court denied his motion to suppress cocaine that a police officer found in his pocket. Reed argues that the trial court incorrectly concluded that cocaine found

in his pocket was admissible under the inevitable discovery exception to the exclusionary rule. Reed further contends that the police subjected him to an unlawful detention. We disagree and conclude that the cocaine from Reed's pocket was admissible under the inevitable discovery exception to the exclusionary rule. We therefore affirm.

I. Background

¶2 On December 1, 1997, Detective Peter Pierce, along with several uniformed officers, responded to a complaint of drug sales at an apartment. Upon arrival, the officers knocked on the door of the residence and spoke with Jannie Jackson, who identified herself as a resident of the apartment. The officers had not obtained a search warrant, but Pierce obtained Jackson's consent to enter and search the residence. During the officers' search of the residence, Pierce found a plastic bag containing cocaine base on the top of a china cabinet in the dining room. The officers also found more cocaine in the living room, three cocaine pipes, two boxes of open sandwich bags, and a spoon with white residue.

¶3 While some of the officers searched the premises, Reed was in the kitchen with Officer Victor Centeno. Because Reed was acting nervously and putting his hand in his left pocket, Centeno became concerned for his safety and patted down Reed for weapons. The pat down did not yield any weapons or other contraband. Centeno then asked Reed for permission to search him, and removed an asthma inhaler from Reed's pocket. Centeno opened the inhaler and found that it contained several baggies of cocaine. Reed was subsequently arrested, some time after Centeno found the cocaine in his pocket.

¶4 The State charged Reed with possession of a controlled substance with intent to deliver in violation of WIS. STAT. §§ 961.41(1m)(cm)1 and

961.16(2)(b)(1) (1997-98).[1] Reed moved to suppress the cocaine found in his pocket, arguing that he had not consented to the search of his pockets. The State argued that the search of Reed's pockets was consensual, and that even if it was not, the cocaine in Reed's pocket was admissible under the doctrine of inevitable discovery because Reed would have been lawfully searched incident to arrest. The trial court denied Reed's motion. While the trial court found that Reed did not consent to the pocket search, it agreed with the State that the cocaine in Reed's pocket was admissible under the inevitable discovery doctrine. Reed then pleaded guilty, and the court entered a judgment of conviction. Reed appeals.

II. Analysis

A. Consent

¶5 We briefly address whether Reed consented to the search of his pockets. Our standard of review for consent to a search is stated succinctly as follows:

> If the State relies on consent for the search, it has the burden of proving by clear and convincing evidence that consent was voluntarily given. Although the trial court's findings of fact will not be disturbed unless they are clearly erroneous, the application of these facts to constitutional principles is a question of law subject to our de novo review.

State v. Stankus, 220 Wis. 2d 232, 237-38, 582 N.W.2d 468 (Ct. App. 1998) (citations omitted). The trial court concluded that the State failed to prove by clear and convincing evidence that Reed consented to the pocket search. Reed, of

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

course, does not contest the trial court's determination on this issue. Because we agree with the trial court that the State failed to show by clear and convincing evidence that Reed voluntarily consented to the search of his pockets, we must address whether the cocaine in Reed's pocket was nevertheless admissible under the inevitable discovery doctrine. We conclude that it was.

B. Inevitable Discovery

¶6 Inevitable discovery presents a question of constitutional law because it is an exception to the exclusionary rule protecting Fourth Amendment interests. *See* ***State v. Anderson***, 160 Wis. 2d 307, 315, 466 N.W.2d 201 (Ct. App. 1991), *rev'd on other grounds*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991). We review constitutional questions de novo. *See* ***State v. Bollig***, 224 Wis. 2d 621, 628, 593 N.W.2d 67 (Ct. App. 1999), *aff'd*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 1999. We agree with the trial court and conclude that the cocaine in Reed's pocket was admissible under the inevitable discovery doctrine.

¶7 The primary purpose of the exclusionary rule is to prevent police exploitation of Fourth Amendment violations. *See* ***Mapp v. Ohio***, 367 U.S. 643, 655-56 (1961); ***State v. Kraimer***, 91 Wis. 2d 418, 431, 283 N.W.2d 438 (Ct. App. 1979), *aff'd*, 99 Wis. 2d 306, 298 N.W.2d 568 (1980). Under the exclusionary rule, if a law enforcement officer conducts an unconstitutional search, then the fruits of that search will normally be excluded from evidence. *See* ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); ***State v. Armstrong***, 223 Wis. 2d 331, 361, 588 N.W.2d 606 (1999). However, the inevitable discovery doctrine provides that otherwise excludable fruits of an illegal search may be admitted into evidence if the tainted fruits would have been inevitably discovered by other lawful means. *See* ***Nix v. Williams***, 467 U.S. 431, 444 (1984); ***State v.***

Washington, 120 Wis. 2d 654, 664, 358 N.W.2d 304 (Ct. App. 1984), *aff'd on other grounds*, 134 Wis. 2d 108, 396 N.W.2d 156 (1986). In ***State v. Lopez*** and ***State v. Schwegler***, we stated the inevitable discovery doctrine as a three-part inquiry. The State must demonstrate:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

State v. Lopez, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996); *see also* ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). Applied here, the inevitable discovery doctrine first requires that the police had probable cause to arrest Reed even without the cocaine in his pocket, and therefore police would have lawfully been in a position to search his pockets incident to arrest. The doctrine also requires that the police had probable cause prior to the unlawful search of Reed's pockets. Finally, the doctrine requires that the police were obtaining evidence against Reed through the active pursuit of an alternate line of investigation. We conclude that each of these requirements was met. Therefore, the cocaine in Reed's pocket was admissible under the inevitable discovery doctrine.

¶8 Reed first argues that the cocaine in his pocket would not have inevitably been discovered by search incident to arrest because the police did not have probable cause to arrest him for the cocaine found in the dining room. We disagree, and conclude that the police had probable cause to arrest Reed by the time the illegal search of his pockets occurred.

¶9 Whether the facts of a given case constitute probable cause to arrest is a question of law that we decide de novo. *See* ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not. *See* ***id.***

¶10 The trial court made a key finding that the police found the cocaine in the dining room prior to the search of Reed's pockets. Reed argues that even so, the State did not have reason to believe that he exercised dominion or control over the apartment, therefore the State did not have probable cause to believe he possessed the cocaine in the dining room. We disagree. Persons are considered to possess drugs found in places immediately accessible to them and subject to their exclusive or joint dominion and control, provided that they have knowledge of the presence of the drugs. *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 814, 436 N.W.2d 898 (Ct. App. 1989). The trial court found that after Pierce knocked on the door, Reed was the one who opened it. Pierce then asked who owned or was in control of the residence, and Reed replied that "Ma" was and called out to her.

¶11 Under these circumstances, the police reasonably could have believed that Reed exercised joint dominion and control over the premises. Specifically, the police reasonably could have believed at that time that Reed was related to "Ma" and lived on the premises with her. *See* ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985) (concluding that police reasonably could infer that defendant with same last name as individual known to live at a residence exercised joint dominion and control). Reed correctly

points out the police may instead have inferred that he did not live on the premises because he called to someone else when the police asked who was the owner or in control. However, "we cannot choose between conflicting inferences if one supports a basis for probable cause." ***Id.*** It is irrelevant that "Ma" (Jackson) later turned out to be unrelated to Reed. When we engage in a probable cause analysis, we limit ourselves to the information within the arresting officer's knowledge *at the time* the arrest was to be made. *See* ***Riddle***, 192 Wis. 2d at 476.

¶12 Reed also argues that there was no evidence showing that he was aware of the cocaine in the dining room. We disagree. There were several circumstances here that constitute knowledge given the governing legal standard. ***State v. Allbaugh*** is instructive on the kinds of circumstances that tend to show knowledge sufficient to constitute possession. In ***Allbaugh***, we explained that:

> among the "incriminating" facts which can "buttress" the inference of knowing possession from joint occupancy of premises in which the drugs are found are: (1) the defendant's "access to ... area[s] in which drugs are found;" (2) whether the drugs are in plain view; and (3) the presence of items used in the manufacture or packaging of drugs.

Allbaugh, 148 Wis. 2d at 813 (citations omitted). While Reed's is not a case of established joint occupancy, ***Allbaugh*** still provides guidance in our probable cause analysis. The dining room was just off the kitchen, the room in which Reed was standing when the officers arrived. While the cocaine in the dining room was not in plain view, the officers also found cocaine pipes, boxes of open sandwich bags, and a spoon with white residue. Thus, two of the three criteria noted in ***Allbaugh*** were present. In addition, the trial court found that the police were responding to a complaint of drug sales out of the premises. The trial court further determined that Reed was attempting to get out of the kitchen and into the dining

room, suggesting that he knew of the cocaine in the dining room and was trying to get to it. Under all of these circumstances, taken as a whole, the police reasonably could have believed that Reed knew about the cocaine on the dining room cabinet.

¶13 Because the police reasonably could have believed that (1) Reed knew of the cocaine in the dining room, and (2) exercised joint dominion and control over the premises, we conclude that the police had probable cause to arrest Reed at the time Centeno searched his pockets. This satisfies the first two requirements of an inevitable discovery inquiry as set out in ***Lopez*** and ***Schwegler***. ***Lopez***, 207 Wis. 2d at 427-28; ***Schwegler***, 170 Wis. 2d at 500.

¶14 The third requirement for inevitable discovery was also met because the police were actively pursuing an alternate line of investigation which led to the evidence justifying Reed's arrest. A comparison to the facts of ***Lopez*** is helpful. In ***Lopez***, the police obtained a warrant to search Lopez's house for marijuana. ***Lopez***, 207 Wis. 2d at 421, 423. During the execution of the warrant, one of the officers located a locked freezer in the basement. *See* ***id.*** at 427. Although Lopez had not been read ***Miranda*** warnings, the officer asked him where he could find the key to the freezer, and Lopez disclosed the key's location. *See* ***id.*** Lopez argued that the marijuana in the freezer should have been suppressed as a fruit of his statement the police obtained in violation of ***Miranda***. *See* ***id.*** The court agreed with Lopez that the police had unlawfully elicited Lopez's statement about the location of the key. *See* ***id.*** However, the court determined that the marijuana in the freezer was admissible under the inevitable discovery doctrine. *See* ***id.*** at 427-28. Because the police had already decided to search the freezer when they asked Lopez about the key, they were actively pursuing an alternate line of investigation. *See* ***id.*** Similarly, the consensual search of Jackson's residence by Pierce was an alternate line of investigation separate from Centeno's unlawful

search of Reed's pockets. This separate consensual search of the premises, which yielded the cocaine in the dining room, supported the probable cause to arrest Reed.

¶15 Even though the inevitable discovery inquiry as set forth in ***Lopez*** and ***Schwegler*** was satisfied here, Reed nevertheless argues that the inevitable discovery doctrine requires something more. He contends that the State must make some further showing that the police would have in fact arrested him absent the search of his pockets. He cites two Seventh Circuit Court of Appeals cases, ***United States v. Cotnam***, 88 F.3d 487 (7th Cir. 1996), and ***United States v. Brown***, 64 F.3d 1083 (7th Cir. 1995), in support of this contention. However, Reed's discussion of the Seventh Circuit's inevitable discovery analysis is incomplete.

¶16 Reed is correct that in ***Brown***, the Seventh Circuit stated that probable cause alone does not always equal inevitable discovery. ***Brown***, 64 F.3d at 1085. However, the ***Brown*** court made this observation in the context of whether the police had probable cause to obtain a warrant to search the defendant's residence. ***Id.*** In fact, a comprehensive review of inevitable discovery cases from both our state courts and the Seventh Circuit leads us to this conclusion: The courts' hesitation in applying the inevitable discovery doctrine is overwhelmingly in response to police failure to obtain a warrant where they otherwise needed one to conduct a search. *See* ***Schwegler***, 170 Wis. 2d at 495, 497-98 (inspection authorities unlawfully searched defendant's business premises without a warrant); ***State v. Anderson***, 160 Wis. 2d at 318 (police unlawfully searched defendant's garage without a warrant); ***State v. Friday***, 140 Wis. 2d 701, 704, 716, 412 N.W.2d 540 (Ct. App. 1987) (police needed a warrant for defendant's car, but unlawfully searched it without one), *rev'd on other grounds*,

147 Wis. 2d 359, 434 N.W.2d 85 (1989); *see also* ***Brown***, 64 F.3d at 1085; ***United States v. Buchanan***, 910 F.2d 1571, 1573 (7th Cir. 1990); ***United States v. Salgado***, 807 F.2d 603, 608-09 (7th Cir. 1986).

¶17 As ***Brown*** itself points out, if evidence were routinely admitted under the inevitable discovery doctrine where the state was otherwise required to obtain a warrant, the Fourth Amendment warrant requirement would be nullified and the concept of prior approval of most residential searches would be eviscerated. ***Brown***, 64 F.3d at 1085. There would be an "inevitable discovery" exception to the warrant requirement, rather than an inevitable discovery exception to the exclusionary rule.

¶18 The concern for nullification of the warrant requirement does not apply to Reed. The issue is whether, absent the illegal pocket search, the police would have arrested Reed, and thus searched him incident to arrest. Arrest based on probable cause and a search incident to arrest are already exceptions to the warrant requirement. *See* ***United States v. Watson***, 423 U.S. 411, 417 (1976) (arrest); ***Chimel v. California***, 395 U.S. 752, 762-63 (1969) (search incident to arrest). Therefore, unlike the case of a foregone warrant, where we should not assume the police would have obtained one even though they did not, the same hesitation need not apply. Because the three-part inquiry of ***Lopez*** and ***Schwegler*** has been satisfied, we need look no further. We conclude that the cocaine in Reed's pocket was admissible under the inevitable discovery doctrine. Therefore, the trial court properly denied Reed's motion to suppress.

*C. **Terry** Investigative Stop*

¶19 Reed also argues that his Fourth Amendment rights were violated because the police detained him in the kitchen without the reasonable suspicion

required. We disagree and conclude that the police had the reasonable suspicion necessary to detain Reed.

¶20 The legality of an investigative stop is a question of law that we review de novo. *See* ***State v. Harris***, 206 Wis. 2d 243, 250, 557 N.W.2d 245 (1996). When the issue, as here, is whether the police have sufficient justification to detain a citizen, we examine that detention in the framework of ***Terry v. Ohio***, 392 U.S. 1 (1968). *See* ***State v. Swanson***, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991) (discussing a "***Terry*** investigative detention").

¶21 A ***Terry*** stop is a form of seizure under the Fourth Amendment. ***Terry***, 392 U.S. at 16; ***State v. Goebel***, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981). A person is seized within the meaning of the Fourth Amendment when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that [she or] he was not free to leave." ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980); *see also* ***State v. Nash***, 123 Wis. 2d 154, 162, 366 N.W.2d 146 (Ct. App. 1985). Under ***Terry***, the police may make such a stop if they reasonably suspect, in light of their experience, that some kind of criminal activity has taken or is taking place. ***Terry***, 392 U.S. at 30; ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990); *see also* WIS. STAT. § 968.24. Reasonable suspicion requires more than a hunch. *See* ***Terry***, 392 U.S. at 27. It must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." ***Id.*** at 21; ***Richardson***, 156 Wis. 2d at 139. However, reasonable suspicion is a less demanding standard than probable cause. *See* ***State v. Guy***, 172 Wis. 2d 86, 95, 492 N.W.2d 311 (1992).

¶22 Reed argues that a reasonable person in his position would not have felt free to leave the premises, therefore he was subject to a ***Terry*** stop. While we acknowledge that Reed was eventually subject to a stop under ***Terry***, we conclude that by that time, the police had the reasonable suspicion necessary to conduct the stop. When the police arrived at Jackson's residence, they had already received repeated complaints of drug sales on the premises, including one very recent complaint. Absent corroboration, such anonymous tips are not sufficient on their own to constitute reasonable suspicion. *See* ***Florida v. J.L.***, 120 S. Ct. 1375, 1378 (2000). However, the police here had more than the complaints of drug sales. Almost immediately after entering Jackson's residence to conduct the consensual search, they discovered cocaine in the residence. This fact, in combination with the complaints of drug sales, are "specific" and "articulable" grounds from which the police could have had more than a hunch that Reed was involved in drug-related criminal activity.

¶23 We cannot conclude, as Reed seems to ask, that individuals in a residence must be considered stopped under ***Terry*** from the moment police enter pursuant to a consensual search of the premises. As ***Terry*** itself recognized, not all citizen encounters with the police amount to seizures. ***Terry***, 392 U.S. at 19 n.16. "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" ***Mendenhall***, 446 U.S. at 553-54 (citation omitted).

¶24 Reed also contends that the trial court applied an incorrect legal standard by supporting its determination that "there was no stop of [Reed]" with a finding that Reed never tried to leave the kitchen. The State also places some emphasis on the trial court's finding that Reed never asked or attempted to leave.

On this point, we agree with Reed. Individuals in encounters with police officers need not ask or attempt to leave for a ***Terry*** stop to arise. *See* ***Mendenhall***, 446 U.S. at 554. To that extent, the trial court applied an incorrect legal standard. However, because we conclude that the police had a reasonable suspicion to stop Reed, the trial court's misapplication of the law on this single point does not change our analysis or its result. We still affirm "[w]here the trial court makes the right decision for the wrong reason." ***State v. Rognrud***, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).

By the Court.—Judgment affirmed.

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