COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0786-CR **Cir. Ct. No. 01-CF-599**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAYON R. WALKER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals an order granting Dayon R. Walker's motion to suppress evidence seized from his motel room. The State contends that the circuit court erred by concluding Walker had been coerced into signing the "consent to search" form. Alternatively, the State argues that the

evidence is admissible under the inevitable discovery doctrine. We agree with both contentions and reverse the order suppressing evidence.

BACKGROUND

¶2 In September 2001, the Fox Valley "tip line" received an anonymous tip about possible drug activity and prostitution in two rooms at the Parkway Inn in the town of Grand Chute. Police officers Chad Probst and Kathy Renaud responded to the motel and ultimately knocked on the door to one of the subject rooms. During a long pause, the officers heard movement in the room, prompting Probst to direct Renaud to go to an outside courtyard "and make sure nobody leaves the room."

¶3 Probst remained at the door and identified himself as a police officer. Walker subsequently answered the door and the trial court found that Walker allowed Probst to enter the motel room. Upon entering the room, Probst "noted a strong odor of marijuana" and asked Walker "if there was anybody else staying in the room with him." After Walker responded "no," Probst looked out an open window and saw Renaud detaining an individual.

¶4 Probst then told Walker that he detected a strong odor of marijuana and informed Walker that the officers "were there responding to a tip about possible drug activity and prostitution." Probst asked Walker whether he had been smoking marijuana and Walker responded affirmatively. Probst then noticed "[a] glass pipe, a smoking device on a night-stand between two beds" inside the room. After reading Walker his ***Miranda***[1] rights, Probst asked whether there was any

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

marijuana left in the room. Walker "reached into his pants and pulled out a small bag of what [Probst] believed to be marijuana."

¶5 Probst then asked for Walker's permission to search the room. The circuit court found that in explaining Walker's options, Probst stated: "Well, you know, we can go the hard way or the easy way." Probst told Walker that he had a right to refuse to consent to a search of the room but that if Walker refused consent, Probst would have to "wake up the judge" and obtain a search warrant. Walker ultimately signed a "consent to search" form. During the search, Walker gave oral consent to search a safe in which Probst found two plastic storage bags of cocaine.

¶6 The State charged Walker with felony possession of cocaine with intent to deliver, misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia. Walker filed a motion to suppress the evidence seized during the consent search. After a hearing, the circuit court granted the suppression motion. The State filed a motion to reconsider, arguing that the evidence was admissible under the inevitable discovery rule. The circuit court denied the motion for reconsideration and ordered suppression of the evidence. This appeal follows.

ANALYSIS

¶7 The State argues that the circuit court erred by concluding that Walker had been coerced into signing the "consent to search" form. Alternatively, the State contends that the evidence is admissible under the inevitable discovery doctrine. We agree.

¶8 For a consent search to be constitutionally permissible, the consent must be voluntary under the totality of the circumstances and not the product of duress or coercion, express or implied. ***State v. Stankus***, 220 Wis. 2d 232, 237, 582 N.W.2d 468 (Ct. App. 1998). 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. ***Id.*** at 237-38. Although the circuit 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. ***Id.*** Among the factors we consider in determining the voluntariness of consent are:

> Whether any misrepresentation, deception or trickery was used to entice the defendant to give consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the agents' request; the defendant's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual that consent to search could be withheld.

State v. Bermudez, 221 Wis. 2d 338, 349, 585 N.W.2d 628 (Ct. App. 1998).

¶9 Here, the circuit court concluded that the "whole tenor" of Probst's conversation with Walker regarding the search "took away [Walker's] voluntariness." The court specifically focused on Probst's statements regarding "the hard way or the easy way," and the possibility of having to "wake up the judge." The court concluded that the situation became involuntary for Walker when he was "worried about getting the whole system mad at him, including judges being woken up at night." We disagree.

¶10 This court has recognized that "[w]hen the expressed intention to obtain a warrant is genuine … and not merely a pretext to induce submission, it

does not vitiate consent." ***State v. Kiekhefer***, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997). Probst's statement that he would have to awaken a judge to obtain a warrant was not a pretext to induce submission, but rather, a truthful description of the alternative to Walker's consent. Probst's expressed intention to obtain a warrant was genuine, as the circumstances were sufficient to establish probable cause for obtaining a warrant. Probst had detected a strong odor of marijuana and observed drug paraphernalia in plain view. Additionally, Walker admitted smoking marijuana and produced a bag of marijuana when Probst asked whether there was any marijuana left in the room.

¶11 Ultimately, Probst informed Walker that he had the right to withhold his consent to search and described the genuine alternative to Walker's consent. Probst did not threaten Walker with any harm or induce his consent through misrepresentations or deception. Given the totality of the circumstances, we conclude that Walker was not coerced into signing the "consent to search" form.

¶12 Even were we to conclude that Walker's consent to search was involuntary, however, the evidence is nevertheless admissible under the inevitable discovery doctrine. 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). The inevitable discovery doctrine requires 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).

¶13 Here, the circuit court denied the State's motion for reconsideration, concluding that the officers did not have sufficient probable cause to obtain a warrant to search the room.[2] We conclude, however, that the circumstances—including a strong odor of marijuana, Probst's observation of the drug paraphernalia, Walker's admission to recent smoking in addition to his producing a bag of marijuana from his person—were sufficient to establish probable cause for a search warrant. Because there was sufficient probable cause to support a search warrant, we conclude the evidence would have been discovered by other lawful means and is thus alternatively admissible under the inevitable discovery doctrine.[3]

[2] The circuit court additionally distinguishes between a warrant to search the room and a warrant to search the safe in which the cocaine was found, indicating that a separate search warrant would have been necessary for the safe. This court has recognized, however, that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." ***State v. Fischer***, 147 Wis. 2d 694, 698, 433 N.W.2d 647 (Ct. App. 1988). Thus, "a warrant to search for drugs authorizes the search of a locked safe which could reasonably be expected to contain drugs." *See* ***id.***

[3] Walker repeats, without elaboration, the State's acknowledgement that the inevitable discovery doctrine "should not be invoked where its use would, as a practical matter, operate to nullify important Fourth Amendment safeguards." Because Probst conducted the search pursuant to what he believed (and what we conclude) was a valid grant of consent, application of the inevitable discovery rule to these facts will not undermine the deterrence principles underlying the exclusionary rule.

By the Court.—Order reversed.

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