COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1320-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD M. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Richard M. Brown appeals a judgment of conviction for sexual assault. The issue is whether the trial court erred when it denied suppression of pornographic materials seized from Brown's apartment during the execution of a search warrant. We conclude that the pornographic

materials were properly seized under the plain view doctrine. Therefore, we affirm.

Brown was convicted of two counts of first-degree sexual assault of a child, contrary to § 948.02(1), STATS., for criminal conduct with two children, ages ten and four. The State proved that Brown administered enemas to both children for his own sexual gratification, although his defense was that he did so to alleviate the children's stomach problems.

The children told a police detective that Brown, their babysitter, had given them enemas with water bags which he kept in his bedroom drawer. The detective averred in her warrant request that she has investigated child abuse cases for eight years and that her "experience both through training and investigation of abuse cases ha[s] shown that persons involved in child abuse cases often collect material and rarely destroy the material used in sexual gratification of the suspect." A warrant was issued to search Brown's apartment for:

> [a]ny enema/water bags or device used for the injection of liquid into the rectum area including: tubes, saline or doush [sic] packages, plastic wraps, blue towel, jell lubricant or cream in the use of giving an enema/sexual contact, any device used to hold the enema/water bag device such as a stand with hooks, any phone books, correspondence or papers with names, address or phone numbers which would tend to identify any other juvenile or the RS/ARS/MR juveniles. Any photos, films, videos or other items (sex toys, publication, etc.) that establish sexual contact with minor which things may constitute evidence of a crime, to-wit: sexual assault to a child, committed in violation of Section(s) 948.02 ….

During the search of Brown's apartment, police seized over sixty pornographic items including sexually explicit videotapes, photographs, and magazines.

Brown moved to suppress the pornographic materials and claimed that the search warrant application did not establish probable cause to obtain these materials. The trial court denied the motion. We do not address the propriety of the probable cause ruling because we conclude that these materials were properly seized under the plain view doctrine.

If evidence is within the plain view of the investigating officer, it may properly be seized if four factors are met:

> '"(1) the evidence is discovered in the course of a *lawful search*, whether initiated by a valid search warrant, a valid arrest warrant, circumstances justifying a lawful warrantless search, or circumstances justifying a lawful warrantless arrest,
>
> (2) the evidence in itself or in itself with facts known to the officer prior to the search, but without the necessity of subsequent development of additional facts, provides a *connection between the evidence and criminal activity*,
>
> (3) the *evidence is discovered in the physical area properly searchable* within the purposes for which the search was initiated, and
>
> (4) the *evidence is discovered while the officer is actually searching* for objects within the purpose for which the search was initiated."'

State v. Wedgeworth, 100 Wis.2d 514, 535, 302 N.W.2d 810, 821 (1981) (citation omitted) (quoted source omitted) (emphasis supplied). The rationale of the plain view doctrine is that an individual has no reasonable expectation of privacy in material which is in "plain view." *See* ***State v. Edgeberg***, 188 Wis.2d 339, 345,

524 N.W.2d 911, 914 (Ct. App. 1994) (citing ***Horton v. California,*** 496 U.S. 128, 133 (1990)). We apply these four factors to determine whether these pornographic materials were lawfully seized under the plain view doctrine.

Lawful Search. Brown correctly acknowledges that the search was lawful insofar as it authorized a search for enema equipment as evidence of sexual contact.[1] Consequently, even if the warrant was invalid to search Brown's apartment for pornographic materials, it was valid to search the apartment for enema equipment.[2]

Connection Between the Evidence Seized and Criminal Activity. The warrant affidavit demonstrated that the police were aware of Brown's prior sexual misconduct with children and that Brown told these children that he used to be a doctor. We conclude that there is a connection between the pornographic materials seized and criminal activity, namely that Brown had administered enemas to these children for his own sexual gratification.

The Evidence was Discovered in the Area Properly Searchable. The warrant authorized a search of Brown's apartment for enema equipment, some of which he kept in a bedroom drawer.[3] In executing the warrant to search for

[1] Brown concedes that he "does not dispute [that the search warrant affidavit] also shows probable cause to search for enema equipment."

[2] The warrant application authorized a search for enema equipment and referenced specific paraphernalia, such as a white water bag ("a little white thing" which "hangs up in the bedroom") and "a red one that he uses."

[3] The warrant application specified that the water bag was "in a drawer in the bedroom."

enema equipment, police properly discovered the pornographic materials in Brown's bedroom, an "area properly searchable."[4]

The Evidence was Discovered While the Officer was Actually Searching for Objects Within the Purpose for which the Search was Initiated. Brown contends once the enema equipment was discovered, the authorization to continue the search ceased. However, police were searching Brown's apartment for "any" enema equipment, as described in the warrant. In fact, police did not find the red water bag until they returned several months later with another search warrant. We conclude that these pornographic materials were found while the police were searching for the enema equipment authorized by the warrant.

Wedgeworth authorizes the seizure of pornographic materials during the concededly lawful search for enema equipment under the plain view doctrine. *See* ***Wedgeworth,*** 100 Wis.2d at 535, 302 N.W.2d at 821. We therefore conclude that the pornographic materials were properly admitted at trial.

By the Court.—Judgment affirmed.

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

[4] Brown argues that the warrant did not authorize a search into the dresser drawers because they were locked. However, police asked Brown for the key to unlock the dresser drawers to search for the enema equipment described in the warrant as being kept in a bedroom drawer.