COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1141-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN C. CLINCY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

ANDERSON, J. John C. Clincy appeals from a judgment of conviction for one count of party to a crime (PTAC) possession of a controlled substance in violation of §§ 161.41(3m) and 939.05(1), STATS., and one count of PTAC possession of drug paraphernalia in violation of §§ 161.573(1) and 939.05(1), STATS. Clincy argues that the trial court erred in denying his motion to suppress the evidence as a result of an illegal search of the vehicle. He further

contends that the evidence at trial did not support his conviction. Because we conclude that the evidence was properly obtained and because we further conclude that the evidence was more than sufficient to support Clincy's conviction, we affirm.

FACTS

On February 16, 1995, Officer Michael Douglas observed a brown Oldsmobile Cutlass driving without registration plates. Upon stopping the vehicle, Douglas identified the driver of the vehicle as Richard Fox and the passenger of the vehicle was identified as Clincy. Clincy indicated that it was his automobile and that he had purchased it the previous day.

Douglas noted that both individuals appeared to be very nervous. He detected a strong odor of alcoholic beverages coming from inside the vehicle and observed what appeared to be a liquor bottle partially covered by a jacket in the back seat. He returned to his vehicle to run Fox and Clincy through dispatch. At that point, he noticed both individuals making "furtive movements" in the front seat of the vehicle. Douglas was informed that Fox's operating privileges were revoked and intended to arrest him for operating after revocation.

Douglas and back-up officers Cybell and Weinkranz approached the vehicle. Clincy and Fox were removed from the vehicle and Douglas proceeded to search it for open intoxicants and weapons. Douglas found four unopened bottles of Seagrams whiskey in the back seat. Underneath the front passenger seat he found an open, partially crushed king can of Budweiser beer. The carpeting around the can was wet with what appeared to be beer and the liquid and can were still cold to the touch. He also found an unopened king can of beer in a paper bag in the front seat.

Douglas attempted to look in the glove box, but it was locked. He asked for the keys; Clincy gave them to him. Douglas asked Clincy if he had any drugs, weapons or alcohol in the glove box. Clincy stated "no." Douglas then asked if he could look in the glove box. Clincy replied "go ahead." Inside the glove box, Douglas found four syringes with hypodermic needles attached. He also discovered a spoon with what appeared to be cocaine in the bowl of the spoon. An additional hypodermic needle full of a brownish-yellow liquid was later found under the floor mat on the front-passenger side of the vehicle.

Clincy and Fox were handcuffed and placed in separate squads. Douglas was advised that Clincy was moving around in the back of his squad, so he had him step out of the vehicle. Douglas observed an orange hypodermic cap, several pieces of tissue with blood spots and a bindle on the seat.[1] He then checked Clincy's pockets and located another empty bindle, some more pieces of tissue with blood spots and a small piece of tinfoil with a brownish-colored powder inside.

Both Clincy and Fox were taken to the station house and were arrested for possession of drug paraphernalia.[2] While at the station, Douglas noticed a needle mark with a dark-colored line on Clincy's arm that "appeared fresh" and was "scabbed over and still moist."

Clincy brought a motion to suppress arguing that the search of his vehicle was conducted without consent, without probable cause and without a

[1] A bindle is a piece of paper folded so that there are no seams and when you put something inside it, usually drugs, it will not leak out.

[2] Clincy was initially charged with possession of heroin and possession of cocaine, along with the drug paraphernalia charge. The complaint was later amended to the current charges.

warrant. The trial court denied the motion. Following a jury trial on February 6, 1996, Clincy was found guilty of PTAC possession of cocaine and drug paraphernalia. Clincy appeals.

DISCUSSION

Motion to Suppress

Clincy does not contest the validity of the investigatory stop; rather, he questions the legitimacy of the search of the vehicle. In reviewing an order denying a motion to suppress evidence obtained as a result of an unlawful search, we will uphold a trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, whether a search and seizure satisfies constitutional demands is a question of law subject to de novo review. *See* ***id.***

"'[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he [or she] may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.'" *See* ***State v. Fry***, 131 Wis.2d 153, 167-68, 388 N.W.2d 565, 571 (1986) (quoting ***New York v. Belton***, 453 U.S. 454, 460 (1981)). "The validity of a search incident to arrest is determined by the legality of the arrest and whether the search was limited to an area from which the defendant might gain possession of a weapon or evidentiary items." *See* ***id.*** at 170, 388 N.W.2d at 572. In terms of a search incident to arrest, there is no meaningful distinction between a locked and closed glove compartment—"all closed containers, locked or unlocked, in an automobile which may be searched incident to an arrest can be searched." *See* ***id.*** at 178, 388 N.W.2d at 576. We conclude that the ***Fry*** requirements were met.

It is uncontested that the arrest of Fox was legal. Initially, Douglas pulled the vehicle over because it lacked the proper registration. The records check revealed that Fox, the driver, was driving after revocation and was subject to arrest. Under ***Fry***, the officer could conduct, contemporaneous to that arrest, a search of the passenger compartment of that automobile.

The search was limited to an area from which the defendant might gain possession of a weapon or evidentiary items. Douglas' search of the vehicle included the back seat, the front driver and passenger areas and the glove box—only after finding drugs in the vehicle did Douglas search the trunk. Douglas testified that he smelled a strong odor of alcohol from the vehicle and saw what he suspected were open intoxicants in the back seat. He also stated that he noticed quite a bit of movement in the vehicle before the search and was concerned that Fox and Clincy might have weapons.

Douglas' concern for his safety was reasonable given the facts known to him at the time he approached the car. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." *See* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). As such, Douglas' actions in ordering Fox and Clincy to exit the vehicle and conducting a search of the passenger compartment, including the glove box, were reasonable given this concern for his safety. *See* ***State v. Guy***, 172 Wis.2d 86, 96-97, 492 N.W.2d 311, 315 (1992) (discussing basis for officer's reasonable belief that her safety was in danger). The suspected drugs were only recovered during this legitimate search for weapons and alcohol.

Compliance with the ***Fry*** requirements adequately protects the privacy rights of vehicular occupants who are not arrested. *See* ***State v. Hamdia***, 135 Wis.2d 406, 410, 400 N.W.2d 484, 485 (Ct. App. 1986). "Evidence of another crime found in a search incident to a lawful arrest for a different offense may be used to prosecute the person on whom the evidence was found." ***State v. Gaines***, 197 Wis.2d 102, 110, 539 N.W.2d 723, 726 (Ct. App. 1995). We conclude that the search of Clincy's vehicle did comport with the Fourth Amendment and the drugs and paraphernalia found in the search incident to Fox's lawful arrest could be used to prosecute both Fox and Clincy. *See* ***id***.

Sufficiency of The Evidence

Clincy next contends that the record is void of any evidence that he intentionally aided and abetted Fox's crimes by either verbal or overt action. Clincy maintains that Fox admitted that the substances found in the car were his and that Clincy was unaware of their existence. Clincy further claims that he did not pick up the items found on him until after the car was stopped. According to Clincy, "[T]he element of intent or verbal or overt action was never proven." Clincy's own testimony belies this assertion.

In reviewing a challenge to the sufficiency of evidence to support a criminal conviction, we will not reverse unless the evidence, viewed most favorably to the conviction, is so lacking 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, 451 N.W.2d 752, 755 (1990). We may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. *See* ***id.*** at 507, 451 N.W.2d at 757-58.

Section 939.05, STATS., provides that whoever is concerned in the commission of a crime may be charged with and convicted of the commission of the crime although he or she did not directly commit it. A person intentionally aids and abets the commission of a crime when:

> acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either (a) assists the person who commits the crime, or (b) is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

See WIS J I—CRIMINAL 400.[3]

As to the possession of a controlled substance charge, Clincy testified that when they were initially pulled over, Fox told Clincy to look down and see if he could see anything. Clincy saw some aluminum foil paper on the floor which he picked up and stuck in his pocket. It is uncontroverted that the substance in the foil paper was cocaine. Fox was convicted of possessing the cocaine and Clincy admitted to concealing the cocaine wrapped in foil for Fox so the officer would not see it. This evidence alone supports the conviction for PTAC possession of cocaine.

Regarding the possession of drug paraphernalia charge, a hypodermic needle with cocaine was discovered under the passenger-side mat, and an orange hypodermic cap, several pieces of tissue with blood spots and a foil bindle containing cocaine were found in Clincy's pocket. Although Clincy

[3] For the possession of controlled substances charge, the State had to prove beyond a reasonable doubt that: (1) Clincy or Fox possessed a substance; (2) the substance was cocaine; and (3) Clincy or Fox knew or believed that the substance was cocaine. *See* WIS J I—CRIMINAL 6030. For the possession of drug paraphernalia charge, the State had to prove beyond a reasonable doubt that: (1) Clincy or Fox possessed an object; (2) the object in question was drug paraphernalia; and (3) Clincy or Fox possessed drug paraphernalia with the primary intent to use it to ingest, inhale, or otherwise introduce into the human body a controlled substance. *See* WIS J I—CRIMINAL 6050.

testified that he had not used drugs for approximately six months, Douglas averred that he noticed a "fresh" needle mark on Clincy's arm that was "scabbed over and still moist." The credibility of the witnesses and the weight of the evidence are for the jury to determine. *See* ***Poellinger***, 153 Wis.2d at 504, 451 N.W.2d at 756. We conclude that, based on the evidence, the jury reasonably could have found Clincy guilty of being a party to the crime of possession of controlled substances and drug paraphernalia.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.