COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2122-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

BARRY A. KUNDERT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

DEININGER, J.[1] The State appeals under § 974.05(1)(d)2, STATS.,[2] an order which suppresses evidence that was obtained by Rock County Sheriff's

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] Section 974.05, STATS., permits the State to appeal certain orders and judgments in criminal matters, including an "[o]rder or judgment the substantive effect of which results in … [s]uppressing evidence." Section 974.05(1)(d)2, STATS.

deputies from Barry Kundert's residence following his arrest. The State claims that, because the items ordered suppressed were found during a valid "protective sweep" of the premises, the trial court erred in concluding that the actions of the deputies violated Kundert's Fourth Amendment rights. We disagree and affirm the trial court's order.

BACKGROUND

At about 2:30 a.m. on April 27, 1997, the Rock County Sheriff's Department received a telephone complaint of shots being fired in a rural residential subdivision. Three deputies were dispatched to the scene. Deputy Jackson spoke with the complainant who told him that she had been awakened by "a volley of gun fire," which she believed had come from Kundert's house, in part because of "a large amount of dead animals found in close proximity to that residence in the woods" on past occasions. Jackson, Deputy Reckard and a third deputy then approached the Kundert residence.

Jackson had observed that a light on the back porch of the Kundert residence and one in the front picture window were both lit when he had first entered the subdivision, but these were now extinguished. Reckard went to the front door while Jackson posted himself at the picture window to observe the interior, where he saw Kundert and his wife seated in the front room. After Reckard knocked, Kundert's wife came to the door and stepped out, closing the main door behind her. While Reckard spoke with his wife, Kundert first remained seated inside but then he walked over to the door. Reckard asked Kundert to step outside to talk with him. In response, Kundert opened the inside door and "leaned out" to see the deputy's identification, but he refused to come out onto the front porch.

At that point, Jackson saw a handgun sitting on a mantel six to eight feet behind Kundert, and he yelled "gun." In rapid succession, the three deputies drew their pistols, pushed open the door, placed Kundert on the living room floor near the front door, and handcuffed him behind his back. Kundert was "slightly resistive" and "argumentative" during the handcuffing. After Kundert was secured on the floor, the deputies "searched the residence for any additional people" and "to make sure there were no other persons that could threaten us." Both Jackson and Reckard testified that they were "concerned for [their] safety":

> We were on a shots fired call -- the initial. The female acted in a suspicious manner when she exited the residence, and the male was uncooperative. It would not be unusual for us to be in fear for our safety. (Jackson)
>
> Well, based on the nature of the complaint, we felt for our safety that we needed to know if there was anybody else in the house, if there was anybody else that had possession of any weapons or anything like that. (Reckard)

During their search of the residence, the deputies found no other people, but they did observe several weapons: a "couple different handguns, a few shotguns, deer rifle, and one AK-47." They seized one of the guns, a .357 magnum revolver that was located on the kitchen table, and some spent shell casings found outside a sliding glass door on the back porch.[3] The kitchen table was "about 25 to 30 feet" from where Kundert was taken into custody. On cross-examination, Reckard also testified that the kitchen doorway was about "25 to 30 feet away from the front door of the house" and that the kitchen table was not visible from the area immediately inside the front door where Kundert was taken

[3] The gun that Jackson had seen through the picture window on the mantel was a .22 caliber pistol. It was "secured" when Kundert was placed in custody. The record does not disclose whether it was seized as evidence. The .22 caliber handgun was not listed in Kundert's suppression motion or the trial court's order.

down and handcuffed. Jackson testified that the kitchen door was "15, 20 feet" from the front door and that the kitchen table was not visible from that area.

Both deputies testified that Mrs. Kundert had told them there was no one else in the residence before they searched it. Reckard acknowledged that, prior to the search, he had not heard "any kind of movement or any sounds from anywhere else in the house" and "had no evidence or any kind of indication there was anybody else in the house." Jackson stated that there were "dogs running around, so there were sounds," but that he had heard nothing or "had any kind of information" to indicate there was another person in the residence. The deputies went into each room on the first floor of the residence but did not search the basement. One deputy remained with Kundert by the front door while the search was conducted.

Kundert was charged with two misdemeanors: use of a firearm while under the influence of an intoxicant and disorderly conduct while armed. He moved to suppress the .357 magnum handgun and the spent casings seized in the post-arrest search of his residence. Following an evidentiary hearing, the trial court granted the motion and entered an order suppressing the items. The State appeals the order suppressing evidence.

ANALYSIS

Both the Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." Wisconsin courts '"consistently and routinely"' conform the law of search and seizure under our constitution to that of the U.S. Supreme Court under the Fourth Amendment. ***State v. Murdock,*** 155 Wis.2d 217, 227, 455 N.W.2d 618, 621 (1990) (quoted

source omitted). In reviewing an order denying a motion to suppress evidence, an appellate court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). "However, whether a seizure or search has occurred, and, if so, whether it passes statutory and constitutional muster are questions of law subject to de novo review." ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990).

During the trial court proceedings, Kundert did not challenge the deputies' warrantless entry into his residence or his arrest inside the front door of his home, nor does he do so on this appeal. Rather, he claims the handgun and shell casings were seized during a search of the residence which exceeded the permissible scope of a search incident to his arrest. The U.S. Supreme Court has described two circumstances under which police may constitutionally search the interior of a residence without a warrant when they are lawfully on the premises to effect an arrest:

> We … hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Maryland v. Buie, 494 U.S. 325, 334 (1990). The protective sweep authorized by ***Buie*** is "not a full search of the premises," but extends "only to a cursory inspection of those spaces where a person may be found" and should last "no longer than is necessary to dispel the reasonable suspicion of danger and in any

event no longer than it takes to compete the arrest and depart the premises." ***Id.*** at 335.

The State seeks to justify the search of Kundert's residence under both of the rationales set forth in ***Buie***. First, it argues that since the kitchen "was adjacent to the living room," the seizure of the .357 magnum from the kitchen table occurred during a valid search incident to Kundert's arrest which did not require probable cause or reasonable suspicion. In the alternative, the State asserts that the deputies were justified in making a post-arrest "protective sweep" because they "had a reasonable belief that the defendant's residence was occupied by someone posing a danger to them." We disagree with both claims.

In ***Buie***, police had obtained arrest warrants for Buie and an accomplice who were suspected of committing an armed robbery. ***Id.*** at 328. After determining that Buie was at his home, six or seven officers went to the residence, entered it and "fanned out" to locate Buie. ***Id.*** An officer located Buie at the bottom of a basement stairwell and arrested, searched and handcuffed him. ***Id.*** Another officer then entered the basement "'in case there was someone else' down there," observed a red running suit lying in plain view and seized it as evidence because it matched a clothing description for one of the armed robbers. ***Id.*** The Supreme Court did not decide whether the seizure was proper under the Fourth Amendment. After enunciating the standards noted above, the Court remanded the case to the Court of Appeals of Maryland to apply those standards to the facts. ***Id.*** at 336-37.

In a case decided three months after ***Buie***, the Wisconsin Supreme Court upheld the seizure of evidence discovered in "the immediate area surrounding the arrestee" during a post-arrest search of a residence. ***Murdock***,

155 Wis.2d at 222, 455 N.W.2d at 620. The court there concluded that the seizure of a weapon from a drawer in a pantry located about three to four feet from the arrested and restrained defendant was permissible because the pantry was "within the area of the arrestee's immediate control." ***Id.*** at 231, 455 N.W.2d at 624. The holding rested on precedents prior to ***Buie*** which had established parameters for searches incident to arrest that were based on the ability of an arrestee to reach a weapon or destroy evidence. ***Id.***; *and see* ***Chimel v. California***, 395 U.S. 752, 762-63 (1969). While the facts before it did not involve concerns for officer safety premised on the possible presence of other persons in the residence, the court characterized the holding in ***Buie*** as "clearly" sanctioning searches of "areas of [the room of arrest] and areas immediately adjoining it from which a third party might launch an attack regardless of whether those areas are within the arrestee's immediate control and regardless of whether the officer has probable cause or a reasonable suspicion to believe someone is hiding therein." ***Murdock,*** 155 Wis.2d at 237, 455 N.W.2d at 626.

This court has analyzed the ***Buie*** standards on facts similar to those before us now.[4] In ***State v. Kruse***, 175 Wis.2d 89, 499 N.W.2d 185 (Ct. App. 1993), police received information that Kruse had threatened the lives of two persons, that he may be carrying a .357 magnum handgun and that he was wanted on a felony warrant in the State of Florida. ***Id.*** at 92, 499 N.W.2d at 187. Three officers went to Kruse's one-bedroom apartment, knocked at the door and were

[4] In their briefs, the parties cite and discuss a number of cases from other jurisdictions which apply the ***Maryland v. Buie,*** 494 U.S. 325 (1990), standards for "protective sweeps." *See, e.g.,* ***U.S. v. Lauter***, 57 F.3d 212 (2nd Cir. 1995); ***U.S. v Harris***, 629 A.2d 481 (D.C. Ct. App. 1993); ***U.S. v. Schultz***, 818 F. Supp. 1271 (E.D. Wis. 1993); ***People v. Cartwright***, 563 N.W.2d 208 (Mich. 1997). While these cases were of some assistance to this court, none are precedential. Neither party cited or discussed ***State v. Kruse***, 175 Wis.2d 89, 499 N.W.2d 185 (Ct. App. 1993).

greeted by Kruse, who invited them into his living room, which was immediately inside the front door. Once inside the apartment, the officers identified and arrested Kruse. ***Id.*** One officer remained with Kruse, who was then handcuffed and seated in the living room. Another of the officers left the living room, went down a hallway and entered a bedroom which was around a corner at the end of the hallway. The officer opened a closet door in the bedroom and discovered a bag of marijuana which he seized. ***Id.*** at 93, 499 N.W.2d at 187. The trial court suppressed the marijuana and we affirmed. ***Id.*** at 94-95, 499 N.W.2d at 188.

In ***Kruse***, as here, the State attempted to justify the seizure under each of the ***Buie*** standards. We rejected the first claim because we concluded "that the bedroom closet was not in the vicinity of the place of arrest and therefore not subject to a ***Buie*** protective search without reasonable suspicion." ***Kruse,*** 175 Wis.2d at 95, 499 N.W.2d at 188. While it is perhaps a closer question on the present facts, we also conclude here that a search of the kitchen and back porch of the Kundert residence cannot be justified under the first ***Buie*** rationale (i.e., that the search of the kitchen and back porch was a "precautionary" observation, properly undertaken without probable cause or reasonable suspicion, "in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched," ***Buie***, 494 U.S. at 334).

The layout of the first floor of Kundert's residence is not entirely clear from the deputies' testimony, but the following facts were established: the kitchen doorway is some twenty to thirty feet from the front door in the living room where Kundert was arrested; the open doorway to the kitchen is visible from the front door area, as is a "small sliver" of the kitchen, but the kitchen table is not; and there is "an open area" with a "half wall," as well as some furniture items, between the kitchen and the front door area of the living room. We conclude that

the kitchen was not shown to be a location in such proximity to the location of the arrest that we may deem it an "immediately adjoining" space "from which an attack could be immediately launched." *See* ***Buie***, 494 U.S. at 334.

Thus, the search of the kitchen and back porch must be justified, if at all, by a reasonable suspicion, based on articulable facts, that those areas "harbored an individual posing a danger to" the deputies, and it is the State's burden to show that this standard is met. ***Kruse***, 175 Wis.2d at 97, 499 N.W.2d at 189. The State would have us find reasonable suspicion from the following facts: shots had been fired in the area shortly before the deputies' arrival and on prior occasions; dead animals had been found near Kundert's residence; the lights at the residence were extinguished after deputies arrived in the area; Mrs. Kundert "acted suspiciously" when she opened the door; Kundert refused to come out on the front porch and attempted to thwart the police entry; and he was "verbally and physically resistive" when they placed him in custody. The problem with this recitation of facts is that none give rise to any suspicion that other persons were on the premises at the time in question.

Deputy Jackson had seen only Mr. and Mrs. Kundert in the residence when he watched the interior of the residence through the picture window. Both deputies heard Mrs. Kundert say there was no one else in the residence, and neither heard sounds or were aware of any other information or indications that others might be present in the residence. The basement of the residence was apparently not searched, even though that would have been as logical a place for dangerous persons to lie in hiding as were the first-floor rooms that were entered. Thus, we conclude, as we did in ***Kruse,*** "that the [S]tate has failed to demonstrate that the officers had a reasonable suspicion based on articulable facts that

[Kundert's kitchen] harbored an individual who threatened their safety." ***Id.*** at 98, 499 N.W.2d at 189.

For the foregoing reasons, we affirm the order suppressing evidence.

By the Court.—Order affirmed.

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