COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3306

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

IN RE THE RETURN OF PROPERTY IN: STATE OF WISCONSIN V. LEONARD L. JONES:

LEONARD L. JONES,

APPELLANT,

V.

STATE OF WISCONSIN,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

EICH, C.J.[1] Leonard Jones appeals from an order denying his request for the return of $1783, which was seized by police during a search of his

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(g), STATS.

person incident an arrest.[2] Jones argues that because the State never commenced proceedings seeking forfeiture of the money under § 961.55(2), STATS., which addresses forfeiture of controlled substances and materials, products and equipment used in the manufacture and transportation of controlled substances, he is entitled to its return. The State, pointing out that the court's order was entered under § 968.20(1), STATS., which deals with the return of property seized during a search, contends that the money is properly considered "contraband" and is not subject to return. We think the State is correct, and affirm the order.

The facts are not in dispute. Jones, the sole occupant of a parked car, was arrested for drunk driving and, in a search incident to that arrest, $1783 was found on his person. According to the arresting officer, the cash was in several "wads," and the bills in each wad were folded in half and facing the same direction. One wad contained $1000 (all in $20 bills), another $129, another $60 (all in $20 bills) and another $180 (all in $20 bills). The officer also found three pieces of charred "Choreboy" scouring pads, which, as an officer experienced in controlled-substance offenses, he knew are regularly used in ingesting crack cocaine. He also found a scale in the car. No drugs were found on Jones's person or elsewhere in the vehicle, and the officer had not witnessed a drug transaction. He testified, however, that, based on his training and experience, the money was drug-related because: (1) Jones had a large number of $20 bills, which represent the most popular price increment for crack cocaine; (2) the cash was divided into

[2] Both Jones and the State indicate that he filed a "motion" seeking return of the money. The record contains no such motion. And while both the circuit court and Jones, at the hearing on Jones's motion to suppress evidence, refer to a "letter," purportedly containing the request, the parties have not directed us to any such letter in the record. Since the circuit court proceeded to rule on Jones's request, however, issuing a written order denying his "Motion for Return of Property," we will assume that such a motion was filed.

several "wads"—a common practice among drug dealers; and (3) Jones's car contained a scale, an essential tool for a drug dealer. The officer also testified that when he asked Jones where the money had come from, he said only that it was a "refund," and, in response to a further inquiry, told the officer it was "none of [his] business."

Jones was charged with possession of drug paraphernalia and operating while intoxicated. For some reason not apparent in the record, the drug charge was eventually dismissed,[3] and Jones "was defaulted" on the OWI charge.

Again, while no such document appears in the record, the circuit court and the State appear to concede that, at some point in the pre-trial process, Jones requested the court to order that the $1783 be returned to him. As indicated, the circuit court denied the motion and Jones appeals.

Jones claims that he is entitled to return of the money because the State failed to initiate formal forfeiture proceedings under § 961.55, STATS. Section 961.55(1) is part of Wisconsin's controlled-substance law. It provides, in general, that all controlled substances and materials and items—including automobiles—used in their manufacture or illegal distribution are "subject to forfeiture." Section 961.55(1)(f) specifically includes in that list "[a]ll property, real or personal, including money, … derived from or realized through the commission of any crime under this chapter." Section 961.55(2) states that all property subject to forfeiture under the preceding subsection "may be seized by any officer or [designated] employee," either with a warrant, under a judgment or,

[3] The State's brief states that the paraphernalia charge was dismissed because Jones had, in the interim, been sentenced to a lengthy prison term in another case.

if incident to arrest, without a warrant or judgment. Section 961.55(3) then states: "In the event of seizure under [§ 961.55(2)], proceedings [to forfeit the property] shall be instituted promptly." And, any property "seized but not forfeited" is to be returned to its rightful owner upon the owner's application and a judicial determination that it is returnable to him or her.

Section 968.20, STATS., which is contained in the general statutory provision governing the commencement of criminal proceedings—specifically in the sections dealing with searches and seizures of property—is the statute under which the State claims the money was seized. It provides:

> **968.20 Return of property seized.** (1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply [to the circuit court] for its return …. If the right to possession is proved to the court's satisfaction, it shall order the property, *other than contraband* … returned ….

(Emphasis added.)

Jones pursued his request for return of the money at the hearing on his motion to suppress the evidence seized at the scene of his arrest. After finding the arrest and search to be valid, the circuit court ruled that the money was contraband within the meaning of § 968.20, STATS., and denied Jones's request.

The State concedes that it never instituted forfeiture proceedings under § 961.55, STATS., and Jones argues that automatically entitles him to the return of the money. He does not explain the argument further, other than to assert that the money was "seized pursuant to section 961.55." In support of that assertion, he refers us to the circuit court's reference to that statute at one point during the hearing—during Jones's examination of the arresting officer:

> THE DEFENDANT: Did you feel you had any probable cause to take that money, and, if so, under what statute did you have any probable cause to take that money?
>
> MR. FARMER [the prosecutor]: Objection, that's –
>
> THE COURT: I'll make that decision. The statute number is 961.55.
>
> ….
>
> THE DEFENDANT: Okay…. [D]o you know what 961.55 says?
>
> [THE OFFICER]: Exactly, no.
>
> THE DEFENDANT: You didn't know then, you don't know now. You didn't know what probable cause was from a hole in the wall. You just wanted to get in that –
>
> THE COURT: You are arguing again.

We do not see the court's comment as a ruling that § 961.55, STATS., rather than § 968.20, STATS., was the controlling legal authority. Indeed, the court's oral decision at the hearing's conclusion was that the money was contraband and thus subject to forfeiture under § 968.20, and its written order was to the same effect.

If the State wishes to pursue forfeiture of property—such as equipment, real estate, or vehicles used in the manufacture or distribution of controlled substances, including money "realized from the commission of a [drug] crime"—it may commence proceedings to that end. Because the State did not pursue a forfeiture proceeding, it may not justify its failure to return the money to Jones on those grounds. But that does not end the inquiry, for there is no question the money was seized as a result of a search incident to an arrest and, under § 968.20, STATS., the property must be returned if he establishes his right to possession and it is not "contraband." Jones devotes much of his argument to the proposition that the money is not contraband.

In ***State v. Benhoff***, 185 Wis.2d 600, 604, 518 N.W.2d 307, 308 (Ct. App. 1994), we relied on § 968.13(1), STATS., for guidance as to what is, and what is not, contraband. The statute delineates the type of property that is subject to search, including "contraband," which it defines as follows:

> Contraband … includes without limitation because of enumeration lottery tickets, gambling machines or other gambling devices, lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films, forged money or written instruments and the tools, dies, machines or materials for making them, and controlled substances … and the implements for smoking or injecting them.

We think the State is correct in asserting that, because all or most of the items specifically mentioned in § 968.13(1), STATS., are related to the commission of a crime, and because the introductory clause expressly states that the list is "without limitation," money which a court could reasonably determine was related to the commission of a crime—or money that represents the illicit proceeds of a criminalized sale—may be considered "contraband" within the purview of the statute.[4] The circuit court ruled as follows:

> Whether or not [the money] constitutes contraband depends on a finding that it is property that is either used in the commission of a crime or is the result of the commission of a crime. This court concludes that this is contraband, and … that conclusion is based on a finding that within the possession of the defendant and within the vehicle solely occupied by the defendant, was a scale used in the ordinary process and usual process of packaging and/or preparing for the delivery of a controlled substance. Further found in the possession of the defendant w[ere] three Chore-Boys,

[4] In general, contraband is defined as a thing or object which is "outlawed and subject to forfeiture and destruction upon seizure," including both property which itself is illegal to possess and property, like cash, which is "innocent by itself but used in perpetration of [an] unlawful act." BLACK'S LAW DICTIONARY 322 (6th ed. 1990).

> which this court can take judicial notice of, based upon its previous experiences and observations, is material that is generally used in either the use of or distribution of controlled substances, to-wit cocaine, specifically.
>
> It is based upon those findings and that conclusion that the court finds the money found in this case was contraband [under] 968.20 of the Wisconsin Statutes.

The court's factual findings are supported by the arresting officer's testimony and are not clearly erroneous. *See* ***State v. Austin***, 171 Wis.2d 251, 255, 490 N.W.2d 780, 782 (Ct. App. 1992). On this record, we are satisfied that the $1783, like the items listed in the statute, is so closely related to the commission of a crime that it may be considered contraband. We conclude, therefore, that the circuit court correctly denied Jones's motion for its return.

By the Court.–Order affirmed.

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