COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1707-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ILIR ALIJI,

DEFENDANT-APPELLANT,

DIN BAJRAKTARI,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Ilir Aliji appeals from a judgment of conviction entered after a jury found him guilty of attempted possession of a controlled

substance (marijuana), with intent to deliver, contrary to §§ 961.41(1m)(h) and 939.32, STATS. He claims: (1) the evidence was insufficient to establish that he committed the crime because he never actually possessed a controlled substance; (2) the crime charged does not exist; (3) the police lacked probable cause to arrest him; (4) the trial court should have granted his motion seeking to suppress evidence because of a ***Riverside*** violation;[1] and (5) the trial court should have granted his motion to suppress his confession because it was the result of an illegal arrest and/or obtained by coercive means. Because the evidence was sufficient to sustain the conviction; because this crime does exist in our statutes; because the police had probable cause to arrest him; because ***Riverside*** does not apply here; and because the trial court did not err in denying the motion to suppress, we affirm.

BACKGROUND

On September 4, 1997, Detective Russell Ratkowski, along with six or seven other police officers, searched the apartment of Din Bajraktari pursuant to a drug search warrant. Marijuana was discovered during the search. At approximately 4:20 p.m. on that date, the phone in Bajraktari's apartment rang. Ratkowski answered the phone. A male, later determined to be Aliji, asked to speak to Din. The detective told Aliji that Din was not available and asked what Aliji wanted. Aliji asked if he could get a "quarter" for $20.[2] The detective said yes, but told Aliji he would only be at the apartment for a short time. The detective then heard Aliji speak to a third person, indicating that he could get the

[1] *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991).

[2] The detective testified that this is a term commonly used to refer to one-quarter ounce of marijuana.

marijuana, but the third person would have to pay $25. Aliji then told the detective he would be there in fifteen minutes. Approximately fifteen minutes later, Aliji knocked on the apartment door. The detective answered the door and Aliji was immediately arrested. A custodial search was performed and $20 was discovered in the pocket of Aliji's pants.

Aliji was transported to the St. Francis police station. He was advised of his rights. He indicated a willingness to talk and initially denied that he was the person who had phoned asking for a "quarter." Ultimately, however, he confessed, explaining that he was buying the marijuana with the intent to pass it on to his neighbor, who would pay $25. Aliji would keep the extra $5 for himself.

Aliji filed a motion to dismiss and motions to suppress. The motions were denied and the case was tried to a jury. The jury found him guilty. He now appeals.

DISCUSSION

A. Insufficiency of the Evidence.

Aliji first claims that the evidence was insufficient to convict him because he never actually possessed the marijuana. We reject this claim.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its 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 and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). In order to prove that Aliji attempted to possess, it is not required that he actually physically possess the controlled substance. Rather, the State must show that he engaged in an act or acts toward the commission of the crime, which demonstrate unequivocally that he intended to, and would have, committed the crime, but for the intervention of another person or other external factor. *See* WIS J I—CRIMINAL 580. Here, there was evidence to support the attempt element—the testimony of the arresting officer and Aliji's confession. A reasonable jury could infer from this evidence that, but for the fact that Aliji was immediately arrested, he would have exchanged his $20 for a "quarter" of marijuana. Aliji committed acts towards the commission of the crime—he came to the drug seller's apartment and knocked at the door with payment for the drugs in his pocket. Thus, the fact that Aliji never actually had the marijuana in his physical possession does not render the conviction invalid.[3]

[3] The case Aliji relies on in support of this argument is distinguishable from the facts present here. ***State v. Henthorn***, 218 Wis.2d 526, 581 N.W.2d 544 (Ct. App. 1998) involved a falsification of the number of refills available on a legal prescription which contained codeine. *See* ***id.*** at 529, 581 N.W.2d at 545. Henthorn allegedly changed the physician-prescribed refill number from 1 to 11. *See* ***id.*** When she took the prescription slip to the pharmacy to fill the prescription, the 11 caught the attention of the pharmacist because only 5 refills are legally allowed. *See* ***id.*** Henthorn was charged with attempted fraudulent acquisition of a controlled substance. *See* ***id.*** at 528-29, 581 N.W.2d at 545. This court concluded that Henthorn's conduct was not sufficient to prove that she would probably not desist from criminal conduct because, when she went to fill the prescription, she was obtaining medicine that she was legally entitled to receive. *See* ***id.*** at 533, 581 N.W.2d at 547. Henthorn would not be attempting to procure a controlled substance by fraudulent means until after she obtained the legal single refill and went back again for another refill. Aliji's situation was very different. He was attempting to obtain an illegal substance, already had a buyer, and was to make a $5 profit on the transaction.

B. Statutory Crime Exists.

Aliji argues that his conviction should be reversed because the crime of "attempt to possess with intent to deliver" does not exist in our statutes. He argues that because ch. 961 is not in the criminal code and is self-contained, the attempt statute cannot be imposed here. We disagree.

Although it is true that ch. 961 does not contain the specific crime "attempt to possess with intent to deliver," this does not lead to the conclusion that the crime does not exist. In its brief, the State explains how this is so. Section 939.20, STATS., states that: "Sections 939.22 to 939.25 apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 951." Thus, the provisions of § 939.32, STATS., our attempt statute, are applicable to the crimes set forth in ch. 961, subject to the terms of the statute. Section 939.32 limits its application to felonies, with some exceptions. We point this out to refute Aliji's reliance on the fact that the legislature specifically included in ch. 961 the crime "attempt to possess a controlled substance," *see* § 961.41(3g), STATS., but failed to include the crime of "attempt to possess with intent to deliver." As pointed out by the State, the legislature did not need to create the latter because it is a felony and, therefore, an attempted crime for possession with intent to deliver exists through § 939.32. Because § 939.32 does not apply to the misdemeanor of simple possession, however, the legislature had to specifically delineate the attempt crime for simple possession.

Having concluded that the statutes applicable here are clear, we need not engage in the rules of statutory construction that Aliji argues support his contention. *See* ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 281, 548 N.W.2d 57, 60

(1996). Our statutes, by virtue of the attempt statute, supply a basis for the crime under which Aliji was convicted.

C. Probable Cause to Arrest.

Next, Aliji contends that his arrest was illegal because the police lacked probable cause to effect the arrest. He argues that the police acted upon mere suspicion that he was the person who telephoned earlier requesting to purchase the drugs. We reject this claim.

Probable cause is not a technical, legalistic concept, but a "flexible, common-sense standard" regarding the plausibility of particular conclusions about human behavior. ***Texas v. Brown***, 460 U.S. 730, 742 (1983).

> Probable cause requires that the police officer have facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant has committed or is in the process of committing an offense. The information available to the officer must lead a reasonable police officer to believe that "guilt is more than a possibility." Probable cause includes the "totality of the circumstances" within the officer's knowledge at the time, though the "'evidence need not reach the level of proof beyond a reasonable doubt or even [show] that guilt is more likely than not.'"

State v. Richardson, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990) (citations omitted).

Here, the trial court put the arrest into proper context:

> Based on the records before me … the Court would agree that there was probable cause to make an arrest in this case.
>
> Now, I think that we -- There's [sic] two errors that we can fall into. One is expecting probable cause to be more than probable cause, either more probable cause or beyond a reasonable doubt; and the issue of the prior agreement to meet at that location, the knowledge of the

> officer that that was a drug activity location, because that was confirmed by the search warrant and the finding and confiscation of drugs, in particular marijuana, at that location, the telephone conversation with the request for marijuana, the time they agreed -- the agreement to meet at that location within a very specific, narrow period of time, and the discussion as to the amount that would be and the cost of that, all those facts and circumstances were in the big picture, as … the detective saw the situation at that point in time, and that does amount to probable cause.
>
> ….
>
> Clearly, if the doorbell had just rung and you were in there doing a search warrant and you know there's marijuana and you know there's a lot of drug activity, I would have mere suspicion that the person at the door might be there to buy drugs; but that would be a situation where there had not been all these other contacts and agreements that had been made.
>
> In this case, the defendant walked right into the narrow window that he had set up and confirmed his activities by doing so … [t]hat is sufficient for probable cause.

We agree with and adopt the trial court's reasoning. Under the totality of the circumstances, there was probable cause to arrest Aliji.

Accordingly, Aliji's claim that the evidence discovered pursuant to arrest should have been suppressed is without merit. The arrest was not illegal and, therefore, the $20 discovered in Aliji's pocket during the search incident to the arrest need not be suppressed.

D. Riverside Violation.

Aliji next contends that his motion to suppress his confession should have been granted because there was no probable cause hearing within forty-eight hours as required by ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). We reject this claim.

Riverside applies to situations when a person is arrested without a warrant and kept in custody. *See* ***id.*** at 52-58. The ***Riverside*** rule, that such persons must be provided a probable cause hearing within forty-eight hours of the arrest, is intended to avoid prolonged detention based on incorrect or unfounded suspicion. *See* ***id.*** at 56-57. ***Riverside***, however, is inapplicable here because Aliji was not kept in custody. He was brought to the police station, where he provided a statement, and was released within several hours after he was arrested. Thus, there was no ***Riverside*** violation and no reason exists to suppress the confession on this ground.[4]

E. Motion to Suppress Confession.

Finally, Aliji challenges the trial court's decision denying his motion to suppress his confession. He claims that the confession was obtained by use of coercive means and, therefore, should be suppressed.[5] The trial court determined that the confession was voluntary and that there was no coercive behavior on the part of the police. We reject Aliji's claim and affirm the trial court.

In reviewing a trial court's ruling on a motion to suppress, we will not overturn findings of fact unless they are clearly erroneous. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987). Whether any constitutional rights have been violated, however, is a question of law that we review independently. *See* ***id.*** To determine whether a confession was voluntarily

[4] We note that although Aliji argues that ***Riverside*** should be extended to non-custodial situations, he has not offered any authority in support of his argument.

[5] Aliji also contended that the confession should be suppressed as "the fruit of the poisonous tree" based on his assertion that the arrest was illegal. However, we have already determined that the arrest was not illegal and, therefore, we need not address this alternative basis for suppression of the confession.

obtained, the essential inquiry is whether the police engaged in coercive means. *See* ***id.*** at 235-36, 401 N.W.2d at 765.

Aliji argues that his confession was not voluntary because he was handcuffed to a bench for over two hours and, during this time, police officers kept passing by without saying anything to him. He claims that he was scared and nervous and that he was experiencing back pain, which was later discovered to be a symptom of his later diagnosis of Hodgkin's disease.

Detective Ratkowski testified that Aliji was left handcuffed to a bench for two and a half hours because the officers were still at the scene of the search warrant and were processing two other people who were arrested at the apartment. The detective also indicated that it was standard procedure to keep a person handcuffed in the booking room and that both cells at the police station were occupied so Aliji had to be restrained to one of the benches. He also testified that officers were passing through the booking room because it was a major pathway through the police department. Aliji admitted that the officers who were walking through did not say anything to him.

Under these circumstances, we agree with the trial court that no coercive means were used to procure Aliji's confession. Aliji was advised of his rights; he indicated that he wanted to talk. He testified that he confessed to the crime because he believed it was the right thing to do and he wanted to go home. Aliji did not request any assistance or services and, therefore, none could be denied. There is no evidence in the record that the police engaged in any improper practices deliberately used to procure a confession. The fact that Aliji was handcuffed and experiencing some back pain is insufficient to render his

confession involuntary. Accordingly, the trial court did not err when it denied Aliji's motion to suppress his confession.

By the Court.—Judgment affirmed.

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