COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-2879-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Terrance Taylor appeals the judgment, entered following his guilty plea, convicting him of possession of cocaine base with intent

to deliver, contrary to WIS. STAT. §§ 961.16(2)(b)1 and 961.41(lm)(cm)1.[1] Taylor contends that the trial court erred in denying his motion to suppress both evidence obtained in a search of his residence and his statements given to police after his arrest. We affirm.

I. BACKGROUND.

¶2 In early June 1997, the Milwaukee Police Department received a tip that drug dealing was taking place at 2736 North 34th Street. In response, several weeks later, members of the vice squad went to the address given by the tipster. As the officers approached the residence, they noticed Taylor locking the door of the upstairs unit of the duplex. Officer Michael Simonis approached Taylor and asked him if he lived there. Taylor confirmed that he did. Officer Simonis then asked Taylor if he had any weapons, to which Taylor replied "no." The officer then frisked Taylor and, in the course of the frisk, felt a pill bottle through Taylor's clothing. The officer then questioned Taylor about the contents of the bottle and he noticed that Taylor became very nervous and contended that the bottle contained only his pills. Taylor then tried to walk away. The officer then reached in and retrieved the pill bottle. He opened it and observed what he believed to be cocaine base. He placed Taylor under arrest.

¶3 After being placed under arrest, Taylor advised Simonis that his three young children were home alone and he requested that he be allowed to get his wife to take care of the children before being taken to the police station. Taylor pointed out the home where he believed his wife could be found, and the

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

police located his wife and returned her to her home.[2] Taylor had been asked if he would consent to a search of the home, but he refused. While driving her to the residence, the police asked Mrs. Taylor if she would consent to a search of the duplex. Officer Simonis testified at the suppression hearing that initially Mrs. Taylor was reluctant to give her consent, stating that she feared the police would "tear up" her home. But, after the police assured her that they would not disrupt her home, she consented. Simonis had Mrs. Taylor sign a statement in his log book that she consented to the search.[3] The police then searched the upper flat and found marijuana, suspected cocaine base and paraphernalia used in packaging drugs.

¶4 Several hours later, the police advised Taylor that additional drugs had been found in the home. The police then took a statement from Taylor, after advising him of his ***Miranda***[4] rights. Taylor confessed to the police that the drugs were his and that he had been selling the drugs for the last several weeks.

¶5 Taylor was formally charged with possession of cocaine base, a controlled substance, with intent to deliver. After a preliminary hearing, Taylor brought a motion to suppress the physical evidence and his statements. At the suppression hearing, the trial court found that the initial drugs discovered in Taylor's pill bottle were illegally seized and had to be suppressed.[5] Despite Mrs.

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[2] Although Taylor was living with Diane Taylor and their children, there is some indication in the record that the parties were divorced.

[3] At the suppression hearing, Mrs. Taylor disputed much of the officer's account of the events.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[5] The State is not contesting the trial court's decision to suppress the contents of the pill bottle.

Taylor's claim that she was coerced into giving consent to search the house, the trial court determined that Mrs. Taylor had freely consented to the search of the home. Finally, the trial court concluded that Taylor's confession was admissible because it was sufficiently attenuated from the taint of the unlawful search. Taylor then entered a guilty plea and was sentenced to thirty months in prison; however, the trial court stayed the sentence and placed Taylor on probation for thirty months and ordered him to serve nine months in jail as a condition of his probation. This appeal follows.

II. ANALYSIS.

¶6 Taylor contends that the trial court erred when it denied his motion to suppress the evidence found during the search of his residence and erred in refusing to suppress his confession given to the police. Whether evidence should be suppressed because it was obtained in violation of the Fourth Amendment is a question of constitutional fact that this court reviews under a two-step standard of review. *See* ***State v. Phillips***, 218 Wis. 2d 180, 189-90, 577 N.W.2d 794 (1998). First, the trial court's findings of evidentiary or historical fact will be accepted by this court and may not be upset unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 190 (quoting ***State v. Woods***, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984)). We then independently apply constitutional principles to the facts as found by the trial court. *See* ***id.***

A. *The search of the duplex was consensual.*

¶7 Taylor argues that the trial court erred in determining that his wife consented to the search of the duplex. He notes that he refused a police request to search his home, and he contends that any consent his wife may have given was coerced by the police. Although Taylor refused to allow a search of the home, his

wife clearly had the ability to consent to the search independently of Taylor's wishes. *See* ***State v. Verhagen***, 86 Wis. 2d 262, 267, 272 N.W.2d 105 (1978) (When two people occupy a house, each possesses authority to consent to a search of it by the police.).

¶8 In a challenge to a consent search, the State bears "the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without duress or coercion, actual or implied." ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971). The test for determining voluntariness of consent under the Fourth Amendment is whether, under the totality of the circumstances, the consent was coerced. *See* ***State v. Rodgers***, 119 Wis. 2d 102, 114, 349 N.W.2d 453 (1984).

¶9 At the hearing, Officer Simonis testified that he had an ongoing discussion with Mrs. Taylor concerning the search of her home while transporting her there. He testified that Mrs. Taylor was originally reluctant to give her consent to the search because she expressed her concern that the police would "tear up" her home. Simonis stated that after he assured her the police would conduct only a cursory search of the house, she gave her consent to the search and she signed a statement in his log book to that effect.

¶10 Mrs. Taylor also testified. Much of Mrs. Taylor's testimony disputed Officer Simonis's account. Mrs. Taylor did agree that while she was being driven back to her home, Officer Simonis asked if they could search the home. She stated that originally she said "yes" to the search, but then she changed her mind and told the officer that he had to get a search warrant. She further related that when she arrived at her home, the police demanded that she give back the keys to the house that had been given to her earlier by one of the officers. She

also related that the police told her that it would take several hours for them to get a search warrant, and that they indicated they would remain in the home until the search warrant was obtained. She also testified that because her children were frightened, she asked the police if she could be allowed to either leave with the children or call someone to take her children. According to Mrs. Taylor, the police told her she could not leave or call anyone. She explained that, given these restrictions, she felt she had no other choice but to allow the police to search the home.

¶11 The trial court found that the officer's testimony concerning the course of events was more credible and consistent than the testimony given by Mrs. Taylor. The trial court reasoned that the officer's version of the events—that Mrs. Taylor had initially expressed concern about the police disrupting her household, but that her fears were alleviated when the officer agreed to conduct only a cursory search—was more believable than the version given by Mrs. Taylor. As noted, this court is obligated to accept the trial court's findings unless they are against the great weight of the evidence. *See* ***Phillips***, 218 Wis. 2d at 190. Here, the trial court's findings are not against the great weight of the evidence.

¶12 The evidence points to the fact that Mrs. Taylor's consent was freely given. First, according to the police account, they promised to conduct only a cursory search. Mrs. Taylor confirmed that the police did not search the entire flat; they searched only the bedroom she shared with Taylor, and the refrigerator. Second, Mrs. Taylor's signature does appear in the logbook, strongly suggesting that she consented to the search. Further, the testimony revealed that at the time Mrs. Taylor gave her consent, she had already been advised that she was not a suspect and that she was not under arrest. Thus, it would appear she did not feel pressured to cooperate in order to avoid arrest. Based on the trial court's findings

and all the attendant circumstances present here, we concur with the trial court that Diane Taylor voluntarily consented to the search of her home.

B. *Taylor's confession is admissible.*

¶13 Taylor submits that the trial court should have suppressed his incriminating statement because it was inextricably tied to the illegal search of his person and was the result of police exploitation of the illegal search. The State argues, and the trial court concluded, that Taylor's statement was subject to the attenuation doctrine and Taylor's statement was sufficiently attenuated from the earlier illegal search that it constituted "'an intervening independent act of free will'" as required by ***Brown v. Illinois***, 422 U.S. 590, 598 (1975) (quoted source omitted).

¶14 As noted, whether evidence should be suppressed because it was obtained in violation of the Fourth Amendment is a question of constitutional fact. *See* ***Phillips***, 218 Wis. 2d at 189-90. We independently review questions of constitutional fact. *See* ***State v. Anderson***, 165 Wis. 2d 441, 447, 477 N.W.2d 277 (1991). Although the exclusionary rule requires the suppression of confessions obtained in violation of the Fourth Amendment, the attenuation doctrine allows for the admission of a confession if it was obtained by means sufficiently attenuated so as to be purged of the taint of the illegal arrest. *See* ***id.*** at 477-48. As such, the attenuation rule is an exception to the exclusionary rule. *See* ***Brown***, 422 U.S. at 599-600. In determining whether a confession is sufficiently attenuated from the prior police illegality, the threshold question is whether the statement was voluntarily given. *See* ***United States v. Patino***, 862 F.2d 128, 132 (7th Cir. 1988). "The remaining factors bearing on admissibility are the 'temporal proximity' of the illegal conduct and the confession, the presence of any intervening

circumstances, 'and, particularly, the purpose and flagrancy of the official misconduct.'" ***Id.*** (quoting ***Brown***, 422 U.S. at 603-04).

¶15 Taylor argues that he gave his statement after he knew that the police had seized illegal drugs from his person and from his home. He claims he only gave a statement after the police illegally searched his person and after a search of his home was conducted against his express wishes. As a consequence, he posits, his statement could not have been an act of free will. We disagree.

¶16 First, we note that Taylor does not dispute that his statement was given after he was advised of and he indicated that he understood his ***Miranda*** rights. Thus, we proceed to apply the tests promulgated in ***Patino*** and ***Brown***. With regard to the "temporal proximity of the illegal conduct and the confession" factor, Taylor's statement was taken over four hours after his arrest. In ***State v. Tobias***, 196 Wis. 2d 537, 538 N.W.2d 843 (Ct. App. 1995), a period of one-and-one-half hours between the illegality and the statement was found to be long enough period to dissipate any taint of an illegal arrest. *See* ***id.*** at 549. We are satisfied that sufficient time passed to eliminate the taint of the illegal search.

¶17 In addition, intervening circumstances occurred here. Taylor's statement was given after the police discovered a large amount of cocaine base during the search of his home. We have determined that the search was lawfully conducted after obtaining Mrs. Taylor's consent to search the home. Thus, at the time of the interrogation, the police had obtained incriminating evidence independent of that found during the illegal search.

¶18 Moreover, the circumstances surrounding the taking of the statement also support a finding of voluntariness. Taylor was interrogated by one officer in an interview room, without being handcuffed. Taylor had been offered something

to drink and had been offered the opportunity to use the bathroom before the interrogation began. The interview process was relatively short. At the hearing, Officer Simonis testified that Taylor was not reluctant to speak to him and that he seemed eager to unburden himself of the information he provided. Thus, the atmosphere at the time of the statement does not suggest that Taylor felt forced or obligated to give a statement.

¶19 Finally, in addressing "the purpose and the flagrancy of the police misconduct" factor, we accept the trial court's observation that the illegal search was not the product of outrageous or flagrant police conduct. As the trial court observed, this was a seasoned officer who worked for the vice squad. He testified that it was his experience that pill bottles were often used to transport illegal drugs. Further, he stated that he believed Taylor was carrying illegal drugs in the pill bottle he felt through Taylor's clothing because of the way the bottle sounded when shaken. We adopt the trial court's rationale that, although mistaken, the officer held a sincere belief that he had probable cause to open the pill bottle, and no shocking or flagrant abuse of police power was involved.

¶20 After applying the appropriate tests, as set forth in ***Patino*** and ***Brown***, we are satisfied that the attenuation rule applies here. Over four hours passed between the time of the illegal search and Taylor's incriminating statement. In the interval, the lawful search of the residence by the police yielded additional illicit drugs and evidence of drug dealing. The circumstances surrounding the taking of the statement suggest that Taylor was not intimidated, coerced or tricked into giving a statement. Finally, while the trial court held that the officer violated the law in opening the pill bottle, the violation was not an egregious act evincing a disregard for the law. Thus, we determine that Taylor's confession was a

voluntary act of free will. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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