COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3098-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TRISHA M. WAUPOOSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Trisha Waupoose appeals her conviction, entered following her guilty plea, for possession of cocaine with intent to deliver, as a party to a crime, second offense, contrary to WIS. STAT. §§ 961.16(2)(b)1,

961.41(1m)(cm)1, 939.05 and 961.48.[1] Waupoose contends that the trial court erred in denying her motion to suppress because, she maintains, the initial police entry into her home was illegal. She further argues that the subsequent discovery of a baggie containing cocaine that slipped down her pant leg was a direct result of the illegal entry and should also have been suppressed. Finally, she submits that the warrantless search of her vagina, which yielded a plastic baggie containing cocaine, was unlawful and should have been suppressed. We disagree and affirm.

I. BACKGROUND.

¶2 On February 19, 1999, two Milwaukee police officers, Chris Edresinghe and Willie Huerta, accompanied by the mother of V.M., a missing fourteen-year-old girl, went to 2224 South 21st Street, to follow up on a tip that V.M. was at the residence. The officers were also told that V.M. was using drugs and dating a man, nicknamed "Papo," who was possibly supplying her with drugs. Upon reaching the address, the officers decided to call for backup because two weeks earlier they had been dispatched to a complaint of a fight at this same address, and before they completed that investigation, several people escaped out the back door.

¶3 After their backup arrived, Officer Edresinghe and another police officer, along with V.M.'s mother, proceeded to the back door. While en route, they observed other police officers intercept two men who were exiting the front door. Officer Edresinghe recognized one of the men as "Papo." Edresinghe knocked at the back door. After a delay of several minutes, during which time

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Edresinghe could hear dogs barking and people moving around, Terry Engstrom, whom Edresinghe knew to be a drug user who lived elsewhere, answered the door. While standing outside the back door talking to Engstrom, Edresinghe saw a young girl inside matching the description of V.M. Edresinghe verified with V.M.'s mother that the girl was, indeed, the missing fourteen-year-old, and he then asked to speak to the girl. Engstrom gave him permission to enter.

¶4 Once inside the house, Edresinghe saw several other people, including Waupoose, whom he had encountered during the earlier dispatch. At the time of the first dispatch, Waupoose had told Edresinghe that her name was "Trisha Trevino." Edresinghe became suspicious of her identity because "Trisha Trevino" did not appear in the Milwaukee Police Department computer, despite "Trevino's" statement that she had been previously arrested. Edresinghe then let "Trevino" go into the house to retrieve some form of identification, but she never returned. The police later learned from neighbors that they witnessed several people, including "Trevino," run away from the house after exiting the back door.

¶5 While inside the residence, V.M. and her mother were reunited and allowed to leave. The police then began to question those present to ascertain their names and to determine who owned or rented the house. Waupoose again identified herself as "Trevino." When no one claimed to actually live at the house, the police decided to arrest everyone present for trespassing. Shortly before Waupoose was to be transported to the police station, the police learned her true identity and also learned that there were two outstanding warrants for her.

¶6 Before transporting Waupoose to the station, the police were also notified that V.M had told her mother that Waupoose had secreted drugs in her vagina shortly before the police entered the house. Officer Jo Ann Hickson

confronted Waupoose with this information, and told her that unless the items were properly sealed, the drugs could endanger her health or even, possibly, cause her death. Waupoose then admitted that she had placed two baggies containing drugs in her vagina, and that she was uncertain whether the baggies were sealed. She offered to go into the bathroom with the officer and remove them, but Hickson would not allow Waupoose to remove the baggies. Instead, Hickson told Waupoose that Waupoose needed to go to the hospital to have the baggies removed to make sure "everything was out."

¶7 Waupoose was then transported to the police administration building and eventually to the hospital. At the hospital, Waupoose placed her handcuffed hands down the back of her pants and dislodged one of the baggies. Hickson recovered the baggie after it slipped down Waupoose's pant leg and landed on her shoe. The baggie contained a substance later determined to be cocaine. With Hickson in the room, a physician's assistant removed another baggie from Waupoose's vagina. The contents of this bag were also tested and found to be cocaine. Waupoose was then charged with possession of cocaine, party to a crime, second offense.

¶8 Waupoose moved to suppress, contending that the police unlawfully entered the home and that her statement to Hickson after Hickson confronted her had to be suppressed because, at the time of the conversation, Waupoose was under arrest and had not received her ***Miranda*** warnings.[2] Finally, Waupoose asserted that the cocaine in both baggies was the fruit of the earlier unlawful entry and, pursuant to ***Wong Sun v. United States***, 371 U.S. 471 (1963), had to be

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

suppressed. The trial court suppressed Waupoose's statements but denied the motion to suppress the contents of the baggies containing cocaine, concluding that the initial police entry into the house was legal because the police were engaged in a community caretaker function. The trial court reasoned that one of the baggies was in plain view, and that the other was the result of a legal body cavity search because the police had probable cause to believe cocaine had been hidden in Waupoose's vagina. Waupoose then pled guilty and the trial court sentenced her to a three-year prison term, to be served consecutively with another sentence.

II. ANALYSIS.

¶9 When reviewing a ruling on a suppression motion, this court accepts the trial court's factual findings unless the findings are contrary to the great weight and clear preponderance of the evidence. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether the facts as found by the trial court pass constitutional muster is a question of law that we review *de novo*. ***Id.*** Moreover, we may elect to decide the constitutional issue on a different basis than that relied upon by the trial court. ***Id.***

¶10 As noted, the trial court found that: (1) the entry into the residence was proper because the officers were acting in their community caretaker role; (2) Waupoose's statements to Officer Hickson, admitting to having placed drugs in her vagina, had to be suppressed;[3] (3) the first baggie containing cocaine was in plain view; and (4) the body cavity search yielding the second baggie containing cocaine was proper because the police had probable cause to believe Waupoose had secreted drugs in her vagina. While we agree with the outcome, we determine

[3] This determination has not been challenged in this appeal.

that the police lawfully entered the home on a different basis than that found by the trial court. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973) (We may affirm the trial court's decision on grounds other than those relied on by the trial court.). We do not agree with the trial court's initial finding that the community caretaker role permitted the police to enter the house. However, we are satisfied that the warrantless police entry was proper because the police were confronted with exigent circumstances that permitted a warrantless entry.

A. *Entry into the residence.*

¶11 Waupoose submits that the trial court erred in finding that the police were engaged in a community caretaker role when they entered the residence. She asserts that the police were not acting in a community caretaker role when they stepped into the home. Alternatively, Waupoose asserts that even if the initial entry was for a community caretaker function, it ended when V.M. was apprehended and united with her mother. We agree with Waupoose that the police were not engaged in a community caretaker function when they entered the home and returned V.M. to her mother's custody.

¶12 In ***State v. Dull***, 211 Wis. 2d 652, 565 N.W.2d 575 (Ct. App. 1997), we defined the community caretaking function, in part, as being "'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" ***Id.*** at 658 (citation omitted). We also determined that community caretaking functions are those that are beyond the "'traditional enforcement of penal and regulatory laws.'" ***Id.*** (citation omitted). We remain unconvinced that the pursuit of a juvenile runaway suspected of being a drug user falls within this definition. Under the circumstances here, when the police entered

the home to apprehend a drug-using fourteen-year-old runaway who was being harbored by at least one known drug user in a possible drug house, the police were engaged in the "detection, investigation or acquisition of" evidence of a crime. Nevertheless, for other reasons, we affirm the trial court's ruling.

¶13 The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; *see also* ***State v. Boggess***, 115 Wis. 2d 443, 445 n.3, 340 N.W.2d 516 (1983) (citation omitted). WISCONSIN CONST. art. I, § 11 is essentially the same and provides that warrantless searches "are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions" that are "jealously and carefully drawn." *See also* ***Boggess***, 115 Wis. 2d at 448 n.8. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984) (citation omitted). A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all governmental agents who seek to enter a home for purposes of search or arrest. ***Id.*** The United States Supreme Court has recognized that all warrantless searches and seizures inside a home are presumptively unreasonable. ***Id.*** at 748-49. However, the presence of exigent circumstances is an exception to the Fourth Amendment's requirement that law enforcement authorities obtain a warrant to conduct a search. ***State v. Richter***,

2000 WI 58, ¶29, 235 Wis. 2d 524, 612 N.W.2d 29; ***State v. Thorstad***, 2000 WI App 199, ¶6, 238 Wis. 2d 606, 618 N.W.2d 240.

¶14 Whether a warrantless entry into a home is justified by exigent circumstances is a mixed question of constitutional fact that this court reviews under two different standards: (1) the trial court's findings of evidentiary or historical fact will not be overturned unless they were clearly erroneous; but (2) this court independently determines whether those facts established exigent circumstances sufficient to justify the warrantless entry. ***Richter***, 2000 WI 58 at ¶26.

¶15 Four categories of exigent circumstances may authorize a law enforcement officer's warrantless entry into a home: "(1) hot pursuit of a suspect; (2) a threat to the safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) a likelihood that the suspect will flee." ***Id.*** at ¶29. In assessing the applicability of the exigent circumstances exception to the warrant requirement for entry into private residences, we weigh the urgency of the officer's need to enter against the time needed to obtain the warrant. ***Id.*** at ¶28. The State bears the burden of proving the existence of exigent circumstances justifying warrantless entry into a home. ***Id.*** at ¶29.

¶16 The existence of exigent circumstances justifying the warrantless entry into a home turns on considerations of reasonableness and involves an objective test: "'[w]hether a police officer under the circumstances known to the officer at time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape.'" ***Id.*** at ¶30 (citation omitted).

¶17 We are satisfied that a reasonable officer, under the circumstances here, could have believed that the procurement of a warrant would have been unwise because it would have enhanced the likelihood of V.M.'s escaping or it could have endangered her welfare. The police had previously experienced suspects fleeing from the house. The officers also testified that the circumstances encountered during the earlier dispatch suggested drug activities were occurring at the residence. The police suspicion about the home being a drug house was heightened when "Papo," believed to be a drug dealer, walked out the front door and another drug user answered the back door. They also were aware that V.M. was a suspected drug user and they saw her at the residence. Consequently, the police were required to act quickly to prevent V.M. from escaping and to prevent her from using drugs. Thus, because the police were presented with exigent circumstances, their entry into the home was reasonable.[4]

¶18 Further, once inside, it was reasonable for the police to ask the names and addresses of those present. The police knew that V.M., a runaway juvenile suspected of using drugs, was in a home with two adults known to be either drug users or drug dealers, along with another adult who had earlier eluded the police. The police action to further investigate was a reasonable one, particularly since one of the men found in the house claimed he was there to purchase drugs.

¶19 "The ultimate standard under the Fourth Amendment is the reasonableness of the search or seizure [or in this instance the investigation] in

[4] Although the police were given consent to enter, the trial court ruled they could not rely on Engstrom's apparent authority because they knew he did not live there. The issue of apparent authority has not been raised on appeal.

light of the facts and circumstances of the case." ***Bies v. State***, 76 Wis. 2d 457, 468, 251 N.W.2d 461 (1977). The issue is whether the police had a right to be where they were and act on their concerns. Clearly, here the police were investigating why the juvenile runaway was in the home, whether drugs were present in the home, and whether the juvenile might have consumed drugs while there. This investigation was motivated by a concern that those present had possibly supplied V.M. with drugs, contributed to her delinquency, unlawfully harbored her, or intentionally interfered with her mother's custody. Consequently, we conclude the questioning was proper because the police were lawfully inside the home and they had reasons to believe crimes may have been committed there.

B. *Plain View*

¶20 Next, Waupoose argues that the baggie containing cocaine which she managed to retrieve from her vagina, later seized by Hickson when it fell down her pant leg, should have been suppressed because it was the product of the initial illegal police entry and there was no attenuation between the unlawful entry and the observation of the baggie. Inasmuch as we have determined that the police entry was proper, Waupoose's argument fails. We adopt the trial court's finding that the baggie was in plain view and properly seized. Here, all the requirements of the test set forth in ***State v. Guy***, 172 Wis. 2d 86, 492 N.W.2d 311 (1992), have been met:

> (1) the evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which [he or] she discovers the evidence in "plain view"; and (3) the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity."

Id. at 101-02 (citation omitted). The baggie was in Hickson's plain view, Hickson was with Waupoose because she was under arrest, and Hickson reasonably believed the baggie contained contraband.

C. *Body Cavity Search*

¶21 Finally, Waupoose complains that the second baggie of cocaine recovered from the body cavity search should have been suppressed both because it resulted from the illegal home entry, and because the police failed to follow the dictates of WIS. STAT. § 968.255.[5] Waupoose concedes that a failure to follow the

[5] WISCONSIN STAT. § 968.255 provides:

> **Strip searches.**
> **(1)** In this section:
> (a) "Detained" means any of the following:
> 1. Arrested for any felony.
> 2. Arrested for any misdemeanor under s. 167.30, 940.19, 941.20 (1), 941.23, 941.237, 941.24, 948.60, 948.605 (2) (a) or 948.61.
> 3. Taken into custody under s. 938.19 and there are reasonable grounds to believe the juvenile has committed an act which if committed by an adult would be covered under subd. 1. or 2.
> 4. Arrested for any misdemeanor not specified in subd. 2., any other violation of state law punishable by forfeiture or any local ordinance if there is probable cause to believe the person is concealing a weapon or a thing which may constitute evidence of the offense for which he or she is detained.
> (b) "Strip search" means a search in which a detained person's genitals, pubic area, buttock or anus, or a detained female person's breast, is uncovered and either is exposed to view or is touched by a person conducting the search.
> (2) No person may be the subject of a strip search unless he or she is a detained person and if:
> (a) The person conducting the search is of the same sex as the person detained, unless the search is a body cavity search conducted under sub. (3);
> (b) The detained person is not exposed to the view of any person not conducting the search;
> (c) The search is not reproduced through a visual or sound recording;
> (d) A person conducting the search has obtained the prior written permission of the chief, sheriff or law enforcement administrator of the jurisdiction where the person is detained, or

(continued)

requirements of § 968.255 does not automatically prevent the admission of any evidence found during the search.[6] She insists, however, that the failure of the police to obtain a warrant for the bodily search merits suppression. She submits that a body cavity search must meet what she contends is the "more demanding ***Schmerber*** criteria."[7] We disagree.

¶22 Waupoose states that, under the ***Schmerber*** test, a warrant was necessary. Waupoose submits that, under ***Schmerber***,

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> his or her designee, unless there is probable cause to believe that the detained person is concealing a weapon; and
>
> (e) A person conducting the search prepares a report identifying the person detained, all persons conducting the search, the time, date and place of the search and the written authorization required by par. (d), and provides a copy of the report to the person detained.
>
> (3) No person other than a physician, physician assistant or registered nurse licensed to practice in this state may conduct a body cavity search.
>
> (4) A person who intentionally violates this section may be fined not more than $1,000 or imprisoned not more than 90 days or both.
>
> (5) This section does not limit the rights of any person to civil damages or injunctive relief.
>
> (6) A law enforcement agency, as defined in s. 165.83 (1) (b), may promulgate rules concerning strip searches which at least meet the minimum requirements of this section.
>
> (7) This section does not apply to a search of any person who:
>
> (a) Is serving a sentence, pursuant to a conviction, in a jail, state prison or house of correction.
>
> (b) Is placed in or transferred to a secured correctional facility, as defined in s. 938.02 (15m), or a secured child caring institution, as defined in s. 938.02 (15g).
>
> (c) Is committed, transferred or admitted under ch. 51, 971 or 975.
>
> (d) Is confined as a condition of probation under s. 973.09 (4).

[6] We could find no case law that supports Waupoose's concession that when the police fail to follow WIS. STAT. § 968.255's directive, the evidence may still be admitted. However, we have elected to accept her assertion without deciding the issue.

[7] ***Schmerber v. California***, 384 U.S. 757 (1966).

> [a] warrantless search will be upheld only if (i) reasonable methods were used, (ii) there was probable cause that evidence would be found, and (iii) there were exigent circumstances making it impracticable to obtain a search warrant first.

LaFave, SEARCH AND SEIZURE (3rd ed.), § 5.3(c), at 135 (discussing ***Schmerber***, 384 U.S. at 766-772).

¶23 The ***Schmerber*** criteria are not the correct standard in which to judge whether a body cavity search is legal. In ***State v. Guy***, 55 Wis. 2d 83, 87, 197 N.W.2d 774 (1972), our supreme court determined that a vaginal search is lawful if the police have probable cause to believe that contraband can be found there.[8] Here, there was probable cause to believe that Waupoose had hidden drugs in her vagina. First, V.M. had witnessed it and told her mother, who told the police. Second, Waupoose admitted it. Thus, the police had knowledge that illegal substances were secreted in Waupoose's vagina and, consequently, the bodily search of Waupoose was legal.

¶24 Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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

[8] The federal district court, in ***United States ex rel. Guy v. McCauley***, 385 F. Supp. 193 (E.D. Wis. 1974), later determined that searches such as the one reviewed in ***Guy*** must be done by medical personnel. That issue is not relevant here.