COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2448-CR **Cir. Ct. No. 2015CF717**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE KEVIN NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kyle Nelson appeals his judgment of conviction for possession with intent to deliver less than 200 grams of tetrahydrocannabinol (THC). Nelson also appeals an order denying his motion to suppress evidence gathered during a warrantless search of his dwelling. We affirm.

BACKGROUND[1]

¶2 In May 2015, Ashwaubenon Public Safety Officers Jeffrey Lade and Chris Sands responded to a noise complaint at an apartment building. Upon arriving, the officers determined the noise was coming from an apartment belonging to Nelson. They stood in the common, open-air hallway and knocked on the apartment door. Nelson answered, and the officers asked to enter his apartment to discuss the noise complaint. Nelson, standing in the apartment doorway, said he "would prefer to do it at the door."

¶3 Nelson had bloodshot, glassy eyes, appeared to be under the legal drinking age, and smelled of alcohol. He admitted to drinking alcohol and that he was eighteen years old. Looking through the open apartment door, the officers saw beer cans and other people, all of whom also appeared younger than twenty-one years old. The officers then asked to enter Nelson's apartment to discuss the apparent underage drinking that was occurring. After hesitating a moment, Nelson consented, saying "yes." He opened the door wide and led them inside.

¶4 Lade and Sands found themselves in a small, one-bedroom apartment with Nelson and at least five other individuals. Lade saw a kitchen, a living room, a bathroom, and a single bedroom. No more than twenty feet

[1] The information in this background section comes from the hearing on Nelson's suppression motion. With one exception, the facts section of Nelson's brief does not include any citations to the record, which omissions violate the Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.19(1)(d) (2015-16) (requiring "appropriate references to the record"); ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322 (failure to include record citations is a violation of RULE 809.19(1)(d)). We admonish counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2) (2015-16).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

separated the bedroom from the front door. The officers could not see into the bedroom from where they stood in the living room. According to Sands, "visibility was not maintained in the bedroom. We were unaware of anybody that could be in there." The officers confirmed that the other five individuals were younger than twenty-one. Lade asked if the apartment contained other people, but he could not recall if he received an answer.

¶5 Sands then "took control of the living room"—that is, he watched the people there and requested their identifications—while Lade swept the apartment. Lade explained why he swept the apartment:

> Due to the fact that it was a small apartment, we had multiple people there, and based on prior training and experience, when people know officers are at a place for an underage drinking party, people hide. So, then I did a sweep of the apartment to make sure there were no more people in the apartment.
>
> ….
>
> [I]f someone is hiding, they can come out when we're not suspecting it. Cause … injury to us or anyone else inside that apartment. So, it's mainly a safety issue for us and the other occupants.

Lade added he did not conduct a full search:

> I am looking at areas where only a person … will fit, such as a full closet, or the other side of a bed I can't see, that would – you know, those areas where a person about the size of the people that we're talking about would be able to hide.
>
> Q. [By the prosecutor:] So, let's say if you see a dresser, you're not opening up dresser drawers?
>
> A. No.

Q. Because people wouldn't be able to fit in there?

A. No.

¶6 Sands also explained why Lade swept the apartment:

> [T]he purpose of the protective sweep is to perform a … protective sweep of the apartment, checking areas where any attacks could be launched against the safety of officers. Due to the fact that it was a living room with a kitchen and a bedroom/bathroom on the back side of the living room so to speak, um, visibility was not maintained in the bedroom. We were unaware of anybody that could be in there. So, we … performed a protective sweep of the apartment to make sure nobody was hiding. It's based off my training and experience when it comes to underage individuals that have consumed alcohol, a lot of them want to try to get away from getting an underage drinking ticket. So, they run and hide. And we were making sure that our safety was first and foremost.

Nelson did not attempt to limit Lade's access to any areas within the apartment during the sweep.

¶7 Lade opened doors to several closets large enough to hold a person. He then followed a short hallway to the bedroom, entered it, saw a closet, and smelled marijuana. Lade looked inside the closet[2] and saw a medium-sized glass jar containing what he suspected was marijuana. He also saw a digital scale on top of a dresser in the closet. Lade found the items in plain view: "Nothing was moved. It was all in plain view. As soon as I walked around the corner, I could see them."

[2] There seems to be some discrepancy in the record as to whether the bedroom closet door was open when Officer Lade entered the bedroom or if he opened that door. For purposes of our analysis, it does not matter if the door was already open because Lade was searching all areas that could contain a person, including the bedroom closet, and would have opened the door had it been closed.

¶8 Lade left the bedroom, returned to Nelson, and asked him for identification. Nelson said he had identification in his bedroom. Lade and Nelson went into Nelson's bedroom. Lade further testified: "And at that point, I pointed the … suspected marijuana out to him and mentioned it to him, at which point he went to grab the jar. And I just told him to leave it where it was at." Lade then asked Nelson for permission to further search the apartment. Nelson refused. To avoid the possible destruction of evidence, the officers froze the scene while Lade requested a search warrant that would permit law enforcement to search all places where drugs or drug paraphernalia may be kept. Lade included his plain-view discovery of the marijuana and digital scale in the probable cause portion of the warrant affidavit. The resulting search pursuant to the issued warrant yielded additional drug paraphernalia and other items related to the sale and use of marijuana, and Nelson was arrested.

¶9 Nelson moved to suppress the evidence found both during the warrantless search and during the warrant search, the latter on the rationale that the warrant affidavit was based on evidence obtained through an impermissible warrantless search. Based upon the evidence presented at the suppression hearing,[3] the circuit court denied the motion, using a reasonableness standard and declaring that police safety constituted an exigent circumstance justifying the protective sweep of places within the apartment where individuals could be hiding.

¶10 Nelson pleaded no contest to possessing THC with intent to deliver, as a repeat offender. He now appeals, challenging the denial of his suppression motion. *See* WIS. STAT. § 971.31(10).

[3] Nelson presented no evidence at the suppression hearing.

DISCUSSION

¶11 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both prohibit unreasonable searches and seizures. "A warrantless search is presumptively unreasonable, and is constitutional only if it falls under an exception to the warrant requirement." ***State v. Tullberg***, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). The Fourth Amendment's warrant requirement does not prohibit police who have received valid consent from entering a person's dwelling. ***State v. Douglas***, 123 Wis. 2d 13, 18, 365 N.W.2d 580 (1985). However, once law enforcement has lawfully entered a dwelling, officers generally must have a warrant to conduct further searches inside, including of rooms and personal property. *See* ***State v. Sanders***, 2008 WI 85, ¶25, 311 Wis. 2d 257, 752 N.W.2d 713.

¶12 There is, however, a "protective sweep" exception to the warrant requirement. ***Maryland v. Buie***, 494 U.S. 325, 327 (1990). A protective sweep is a "quick and limited search of [the] premises," and includes searches both of nearby areas incident to an arrest and of areas where persons posing a danger to police and people on the scene might hide. ***Id.*** at 335-36. To justify the broader sweep into the latter area, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing the area to be swept harbors an individual posing danger to those on the arrest scene." ***Id.*** at 337; *see also* ***State v. Horngren***, 2000 WI App 177, ¶20, 238 Wis. 2d 347, 617 N.W.2d 508.

¶13 Protective sweeps must be limited in space and time. Police may conduct "a cursory inspection of those places where a person may be found," and

that inspection may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." ***Buie***, 494 U.S. at 335-36. Police cannot simply search for possible evidence or contraband, but "evidence or contraband seen in plain view during a lawful sweep can be seized and used in evidence at trial." ***United States v. Garcia-Lopez***, 809 F.3d 834, 839 (5th Cir. 2016).

¶14 The constitutionality of a search presents a question of constitutional fact. *See* ***Sanders***, 311 Wis. 2d 257, ¶25. This court upholds the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous, but we independently apply constitutional principles to those facts. ***Id.***

¶15 Here, there is no dispute Officers Lade and Sands lawfully entered Nelson's apartment with his consent. Rather, Nelson argues, alternatively, that: (1) the protective sweep exceeded the geographic scope of his original consent to enter; (2) the sweep exceeded the geographic scope of a proper search incident to arrest; and (3) the circumstances encountered by the officers—a boisterous underage drinking party—did not pose an actual, legitimate threat to officer safety and, further, did not cause Officers Lade and Sands actually to be fearful.[4] We disagree with Nelson in all respects.

¶16 First, the officers did not hear Nelson place any limitations on their access to the apartment. Nelson did not present any countervailing evidence at the suppression hearing. But even if Nelson had attempted to tell the officers where

[4] Nelson does not challenge the plain-view status of the marijuana and the digital scale. He also does not argue that, even if valid at its inception, the protective sweep went on too long, or that Lade improperly expanded the scope of the search to areas in which a hidden assailant could not be located.

they could search, ***Buie***'s rule of reasonableness, not the resident of a dwelling, defines the proper scope of a protective sweep as including any adjacent areas where a person posing a danger might hide. ***Buie***, 494 U.S. at 334. Nelson's consent or lack thereof in this regard is irrelevant.

¶17 Second, and fundamentally, Nelson misapprehends the nature of the search that occurred. Nelson appears to believe a protective sweep is only justified as a search incident to arrest, which, he argues, could not have resulted here since the underage partygoers were merely suspected of ordinance violations. However, as indicated above, *see supra* ¶12, ***Buie*** applies to non-arrest situations as long as there is "a showing of a reasonable suspicion of dangerous individuals in the house." ***United States v. Waldner***, 425 F.3d 514, 517 (8th Cir. 2005).

¶18 The sweep at issue here was not a search incident to arrest. Rather, Lade conducted a limited search of areas where persons posing a danger might hide, which included Nelson's bedroom and the closet within it. ***Buie*** and its progeny give law enforcement, insofar as is reasonable under the circumstances, the ability to ensure that a residence does not harbor another person who could unexpectedly launch an attack, regardless of whether an arrest is already underway. Nelson's whole argument on this issue incorrectly relies on statements in the case law discussing only searches incident to arrest, rather than searches in the form of a broader (yet still itself limited in scope and time) protective sweep.

¶19 Thus, Nelson's citation to ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), is unavailing for a variety of reasons. First, Nelson stretches ***Welsh***'s holding beyond reason. ***Welsh*** held "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." ***Id.*** at 753. But ***Welsh*** involved law

enforcement's warrantless entry into a residence without consent to effectuate an arrest. ***Id.*** at 743. Unlike the officers in ***Welsh***, Lade and Sands were already in Nelson's apartment with his consent at the time of the protective sweep. *See* ***Welsh***, 466 U.S. at 743 & n.1. Second, because ***Welsh*** involved claimed exigencies for the entry itself, *see* ***id.*** at 753, that decision said nothing about the justification and permissible scope of a protective sweep performed by police who are present on premises with the lessee's lawful consent.

¶20 Finally, Nelson cites no authority for his contention—and we are aware of none—that law enforcement must demonstrate actual danger or subjectively feel fear in order for them to conduct a lawful protective sweep. Rather, "[t]he officers need not demonstrate any danger; they may look simply as a precaution." ***United States v. Brown***, 64 F.3d 1083, 1086 (7th Cir. 1995). "The underlying rationale for the protective sweep doctrine is the principle that police officers should be able to ensure their safety when they lawfully enter a private dwelling." ***Leaf v. Shelnutt***, 400 F.3d 1070, 1087 (7th Cir. 2005) (citing ***United States v. Arch***, 7 F.3d 1300, 1303 (7th Cir. 1993)). In any event, prior cases suggest some potential fear is inherent in settings such as we find in this case: "An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." ***United States v. Richards***, 937 F.2d 1287, 1291 (7th Cir. 1991) (quoting ***Buie***, 494 U.S. at 333).

¶21 Under the circumstances here, Lade and Sands could reasonably be concerned about their safety so as to briefly act to ensure it. They had discovered multiple people at a noisy, underage drinking party. The officers' testimony (not to mention common sense) supports a reasonable inference that, upon law enforcement suddenly arriving at such a party, individuals often scatter and hide. When the officers asked about the presence of other people, they did not recall

receiving a definitive answer, and it was clear there were areas that could conceal a person (including the closet in which the suspected marijuana was discovered in plain view). The officers could not examine these areas without sweeping the apartment. Nelson never confronted these facts below, and largely ignores them on appeal.

¶22 Given those facts, the officers reasonably concluded they faced a specific, articulable threat, because "when people know officers are at a place for an underage drinking party, people hide." If underage drinkers hid in the bedroom—including its closet—someone exiting the bedroom would have had instant access to the rest of the apartment and to the officers within it.[5] The possibility of sudden violence to Lade and Sands or even just the scene becoming unsecure could put not only the officers at risk, but the other occupants as well. According to Lade, if someone comes out of hiding unannounced, "when we're not suspecting it. [It could] cause injury to us or anyone else inside that apartment." These concerns made it reasonable for Lade to sweep the bedroom. Possible intoxication of such hiders only enhanced the danger. *Cf.* ***State v. Marshall***, 2002 WI App 73, ¶42, 251 Wis. 2d 408, 642 N.W.2d 571 (Schudson, J., concurring) (noting the increased possibility that intoxicated individuals will engage in "dangerous, physical confrontations" upon being required to submit to a blood draw).

[5] The notion that some individuals might hide to avoid detection does not render the protective sweep unreasonable. Put simply, officers cannot know a person's intentions, including whether that person has secreted himself or herself away merely to hide or for more nefarious purposes. In addition, even a person in hiding to avoid an underage drinking ticket might later decide to flee, which would implicate Lade's and Sands's safety concerns.

¶23 "Fourth Amendment reasonableness 'is predominantly an objective inquiry.'" ***Ashcroft v. al-Kidd***, 563 U.S. 731, 736 (2011) (citation omitted). We conclude the officers' warrantless protective sweep here was reasonable in terms of its purpose, scope and time. As an objective matter, nothing Lade and Sands did here was constitutionally unreasonable. Rather, the law enforcement activity which occurred inside Nelson's apartment complied with ***Buie***.

By the Court.—Judgment affirmed.

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