COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 00-2220-CR
00-2221-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH C. JANSEN,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Joseph C. Jansen appeals from the judgments of conviction entered against him. The issues presented for review on appeal are whether Jansen consented to a search of his home, whether a subsequently issued

search warrant was proper, and whether a pat-down search of Jansen was proper. Because we conclude that the searches were proper, and that the warrant issued was valid, we affirm.

¶2 Jansen was convicted after trial of possession of drug paraphernalia and possession of THC with the intent to deliver. Before trial, Jansen had moved to suppress certain evidence obtained by the police on the grounds that the search warrant had been issued without probable cause, the police did not have grounds to perform a pat-down search of him, and the police coerced his consent to enter his house.

¶3 At the hearing on the motion, the State presented the testimony of the officer who had conducted the searches. He testified that in April 1999, he went to Jansen's home to talk to Jansen about a burglary. He stated that he had known Jansen for many years and was able to personally identify him. The officer further testified that when Jansen opened the door to his house, the officer smelled marijuana. The officer asked Jansen for permission to search the house. Jansen initially said no. The officer then told Jansen that because of the odor of marijuana, and his experience as a police officer, he had enough information to apply for a search warrant for the residence. Jansen then told the officer that he had only smoked a joint. The officer again said that he had enough information to request a search warrant and again asked if he could search. Jansen hesitated and then asked for five minutes so he could go flush everything. The officer said no and then asked Jansen how much he had in the house. The officer told Jansen that if he did not have more than an ounce, the officer would just be referring charges to the district attorney's office. Jansen then gave his consent to search. During the search, the police collected quite a bit of evidence, including eighty-six grams of marijuana.

¶4 In May 1999, the same officer also obtained a warrant to search Jansen's residence. The officer obtained the warrant after finding a plant stem in Jansen's garbage which subsequently tested positive for the presence of THC. After obtaining the warrant, the officer found Jansen in a bar. Jansen was asked to accompany the officer to Jansen's house. Jansen agreed. Before Jansen got into the squad car, the officer patted him down and found a metal container which smelled liked marijuana. The officer testified that it was his standard policy to pat-down anyone who would be riding in the squad car sitting in the back seat. The officer also testified that Jansen did not object to the pat-down.

¶5 The officer then went to Jansen's residence and searched it. At the residence, Jansen told the officer that he had an attorney and he was not going to talk. The officer told Jansen that he was going to bring in a drug detection dog. Eventually, Jansen showed the officer where he had marijuana hidden. After hearing the evidence, the circuit court denied the motions to suppress the evidence. Jansen appeals.

¶6 On appeal, Jansen argues that the May 1999 search warrant was not valid because there was not probable cause to issue it, it was overly broad, and it was issued without reason to believe that the items to be seized would be found in the residence. Jansen further argues that his consent to the April search was coerced and that the pat-down search was unlawful. We disagree and affirm.

¶7 First, we note that the State has argued that only the April search of the residence is at issue on this appeal. Our review of the record, however,

establishes that Jansen appealed from both judgments.[1] Consequently, we will consider all the arguments Jansen raises.

¶8 Jansen argues that his consent to search his home in April was not voluntary because, after he initially refused consent to search, the officer stated that he could go and obtain a search warrant. Jansen asserts that he was coerced into granting his consent. We review the voluntariness of a consent to search under a two-step analysis. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). "[W]e will not upset the circuit court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear preponderance of the evidence. We will, however, independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met." ***Id.*** (citations omitted).

¶9 We conclude that Jansen's consent was voluntary, and that the officer acted properly in obtaining Jansen's consent. The officer came to talk to Jansen about a burglary. When Jansen opened the door, the officer smelled marijuana. After Jansen initially refused consent to search, the officer explained to him that he had enough information to go and obtain a search warrant. This was a true statement. Further, it is clear that Jansen understood the officer would be searching for drugs. The officer asked Jansen how much marijuana he had in the house and Jansen asked the officer for time to flush everything.

¶10 This is not a situation as in ***State v. Munroe***, 2001 WI App 104, No. 00-0260-CR, where the officers used a ruse to gain permission to enter a room. In

[1] Appeal number 00-2220-CR is from Walworth county case no. 99-CF-172. Appeal number 00-2221-CR is from Walworth county case no. 99-CM-247. Both judgments are dated April 17, 2000. The cases were consolidated by this court on August 24, 2000.

that case, the police officers were on duty to check hotel rooms for anything illegal. ***Id.*** at ¶2. The officers obtained the defendant's consent to enter his hotel room by telling him that they were there to check his identification. ***Id.*** at ¶5. Once they determined that his identification was valid, they asked for permission to search his room. ***Id.*** This court concluded that the officers had used a stated purpose which was not true to gain entry to the defendant's room. Once they determined that his identification was valid, the license granted to them by the defendant to be in his room vanished and "they had no authority to use their continued presence in his room to conduct a general search." ***Id.*** at ¶11.

¶11 In this case, however, the officer did not use a ruse to gain entry to Jansen's house. The officer explained truthfully to Jansen that he had enough information to obtain a warrant to search the house. There was no evidence of any kind of misrepresentation or physical duress. Jansen was not coerced into consenting to the search of his house.

¶12 Jansen also argues that the search warrant issued in May 1999 was invalid because there was no probable cause and the warrant was overly broad. The warrant to search Jansen's house was based on the facts that marijuana had been found in Jansen's home in April, and that a plant stem which tested positive for THC had been found in Jansen's garbage. The test for issuing a search warrant is whether probable cause exists to believe that objects linked to the commission of a crime are likely to be found in the place designated in the warrant, based on the totality of the circumstances set forth in the warrant application. ***State v. Ehnert***, 160 Wis. 2d 464, 470, 466 N.W.2d 237 (Ct. App. 1991). Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Kerr***, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994). On review, this court is obligated to give great deference to the warrant-

issuing judge's determination of probable cause. ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). The results of the April search and the plant stem found in the garbage can were sufficient facts to believe that objects linked to the commission of a crime were likely to be found in Jansen's residence. We agree with the circuit court that the facts established probable cause to obtain the warrant.

¶13 We also conclude that the warrant was not overly broad. The warrant identifies, with specific particularity, items commonly associated with drug use and delivery, and is based on the facts set forth in the affidavit, including Jansen's statement that he had given marijuana to others in the past.

¶14 Jansen also argues that the pat-down search of his person before he entered the squad car was invalid. Jansen, relying on ***State v. Mohr***, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186, argues that, absent a reasonable suspicion that the pat-down search would turn up evidence of a weapon, it was unlawful. This case, however, is distinguishable on the facts. In ***Mohr***, the officer had interactions with Mohr and a significant period of time elapsed before the officer conducted the pat-down search. ***Id.*** at ¶15. Here, the circuit court found that the pat-down search was conducted for the officer's protection as he was executing the search warrant by transporting Jansen in the squad car. We agree that the pat-down of Jansen prior to putting him in the squad car was a proper measure taken for the officer's security as he was executing the search warrant.

¶15 For the reasons stated, we conclude that the warrantless search of Jansen's home in April was reasonable, that the police had probable cause to obtain a warrant to search Jansen's home in May, that the warrant itself was not

overly broad, and that the pat-down search conducted as the warrant was being executed was reasonable. Therefore, we affirm the judgments of conviction.

By the Court.—Judgments affirmed.

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